v. 2920

No. 14590

United States Court of Appeals for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN, Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(And Related Cases)

Transcript of Record

Appeal from the United States District Court for the District of Oregon

FILED
MAY - 4 1955
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-18-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. Civ. 5190

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiffs complain and allege:

I.

That at all times herein mentioned the Federal Public Housing Authority was a governmental agency created by executive order No. 9070, Feb. 24, 1942 (Title 50 USCA App. Sec. 601), by virtue of authority vested by act of Congress Dec. 18, 1941 (Public Law 354, 77th Congress, Title 50 USCA App. 601), as amended. Plaintiffs are husband and wife.

II.

This Court has jurisdiction of this action under Section 24 of the Judicial Code, 28 USCA 41 and Chapter 753, Section 410 et seq., Act of Aug. 2, 1946, 60 Stat. 843, as amended, Title 28 USC, Section 1346, known as Federal Tort Claims Act.

III.

That on or about the 18th day of January, 1918, there was created pursuant to the laws of the State of Oregon Peninsula Drainage District No. 2 con-

sisting of the area of land, lying in Multnomah County, Oregon, bounded generally as follows: On the north by Oregon Slough and Columbia River; on the east by Peninsula Drainage Canal; on the south by Columbia Slough; on the west by a levee running south from the intersection of Union Avenue and Denver Avenue to the point of intersection of Denver Avenue and Columbia Slough; as first constructed this west levee had an elevation of 28 feet and was sixty feet in width at the top; and prior to 1942 was raised to an elevation of approximately 35 feet; this said levee was also used for highway purposes, such highway being known as Denver Avenue and/or U. S. Highway 99 W; that said highway was also a highway of the State of Oregon.

IV.

That at all times mentioned herein the plaintiffs were the owners of certain real property lying within the boundaries of the said Peninsula Drainage District No. 2 consisting of approximately ¾ths of an acre of land, known as 819 N. Marine Drive, Portland, Multnomah County, Oregon; said property was improved by a frame dwelling house and chicken house, and upon which property was furniture, furnishings, equipment, tools, clothing, personal effects and other personal property, and which said premises were occupied by the plaintiffs as their home.

V.

That the Columbia River drains a vast area of land and carries a tremendous volume of water frequently cresting at flood stage at elevation in

excess of 25 feet. That the plaintiffs relied on the protection and security of the levees bordering and enclosing Peninsula Drainage District No. 2 in which their above-described property is located and in reliance thereon maintained their home thereon and made the valuable improvements mentioned.

VI.

That in November, 1942, the Federal Public Housing Authority, while acting as an agency or instrumentality of the United States of America, in order to have easy access to a housing project then and for some time thereafter maintained by it, lying on either side of Denver Avenue, wrongfully and tortiously cut and severed the said levee on which Denver Avenue is located, and excavated and removed hundreds of yards of dirt and gravel constituting the levee, and thereafter built and established a bridge continuing Denver Avenue over such breach and excavation, and an access road or highway under the level of Denver Avenue to the site of the housing project; that the effect of this excavation and severance of the levee was to entirely destroy its usefulness in the purpose for which it was constructed, namely, to protect the lands and property of these plaintiffs and others situate in District No. 2, from the flood waters of the Columbia River or its tributaries. That the said Federal Public Housing Authority and the U. S. Army Corps of Engineers, are agencies and instrumentalities of the United States of America, and both agencies maintained said breach and the bridge constructed over it on Denver Avenue and the access road thereunder continuously from November, 1942, until

May, 1948, and at no time during such period did the defendant install, construct or maintain any adequate or reasonable levee or barrier to render said Denver Avenue fill or levee again suitable for the purpose that it was used and intended, namely, to protect the lands and property lying within the boundaries of Peninsula Drainage District No. 2, including the lands and property of the plaintiffs against the flood waters of the Columbia River and its tributaries.

VII.

That in May, 1948, the level of the Columbia River rose to flood stage reaching an elevation on May 30, 1948, of approximately 30 feet. That on said date the lands lying in Peninsula Drainage District No. 1, immediately west of and adjacent to Peninsula Drainage District No. 2, and using Denver Avenue levee as a common boundary, became flooded, and water poured into and against the Denver Avenue levee.

VIII.

That because of the wrongful and tortious act of the Federal Public Housing Authority and the U. S. Army Corps of Engineers, as agents and instrumentalities of the defendant, in cutting, severing and removing a portion of said Denver Avenue levee, and continuing such severance, removal and breach, the levee was rendered useless as a protection against the flood waters, and the entire area of District No. 2, including the lands, structures, improvements, furniture, furnishings, equipment and other personal property of the plaintiffs became flooded with water; that as a direct and proximate result of the

wrongful and tortious act of the defendant and the flooding of the plaintiffs' premises, furniture and furnishings, heating equipment and machinery, and clothing of the plaintiffs of the value of $4,987.45, was swept away and destroyed and the plaintiffs have thereby sustained damages in the amount of $4,987.45; that prior to the flooding of the plaintiffs' premises, as hereinbefore set forth, the plaintiffs' land, residence and improvements were of the value of $4,500.00, and as a direct and proximate result of the wrongful and tortious act of the defendant, said land, and the improvements thereon, was depreciated in the amount of $2,000.00; that the plaintiffs have suffered full damages in the amount of $6,987.45;

IX.

That the plaintiffs have presented no claim against the defendant or any of its agencies or employees on account of any of the matters or things herein alleged.

X.

That the plaintiffs have agreed to pay their attorneys herein a sum equal to 20 per cent of the amount recovered, as provided by law; that such a sum is a reasonable fee to be paid for such services.

Wherefore, these plaintiffs pray for a judgment against the defendant for the sum of $6,987.45, together with plaintiffs' costs and disbursements herein incurred, said judgment to provide that 20 per cent of the amount of recovery shall be paid to plaintiffs' attorneys herein.

Dated this 15th day of December, 1949.

W. K. PHILLIPS, and
WM. C. RALSTON,

/s/ CLIFFORD G. SCHNEIDER,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 15, 1949.

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES

Comes now defendant, the United States of America, and for its answer to the complaint alleges:

First Defense

1. The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

2. The Court has no jurisdiction of this action under the Federal Tort Claims Act or otherwise.

Third Defense

3. The acts of alleged negligence described in the complaint all took place prior to the enactment of the Federal Tort Claims Act and therefore such acts of alleged negligence are not actionable under that statute or at all.

Fourth Defense

4. Section 702c of Title 33 of the United States Code specifically provides that defendant shall not be liable for or held responsible for damage caused by floods or flood waters.

Fifth Defense

5. All damage, loss or injury described in the complaint was caused, if at all, by an exceptionally severe flood of the Columbia River and its tributaries over which the agency of man had no control and all such damage, loss or injury, if any, is the result of an act of God for which neither defendant nor its agencies or employees are in any way responsible.

Sixth Defense

6. The Court has no jurisdiction of this action and no claim is stated against defendant for the reason that all claims set forth in the complaint in so far as they are based upon an act or omission of an agency or employee of defendant, either while acting within the scope of its or his office or employment or otherwise, are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty for which defendant has not consented to be sued under the provisions of the Federal Tort Claims Act or at all.

Seventh Defense

7. Defendant and all its agencies and employees exercised due care in all matters referred to in the complaint.

Eighth Defense

8. Plaintiff(s) by residing in, owning or possessing property located within Peninsula Drainage District No. 2 assumed all risk of loss of, damage to or destruction of the property described in the complaint by reason of the failure of any embankment

surrounding the Drainage District. If and to the extent that plaintiff(s) acquired or improved any property in Peninsula Drainage District No. 2 after the alleged acts of negligence or wrongful conduct referred to in the complaint, plaintiff(s) assumed all risk of loss on account of such alleged negligence or wrongful conduct and waived all right to complain thereof.

Ninth Defense

9. Defendant denies each allegation of negligence or wrongful conduct set forth in the complaint and alleges that if plaintiff(s) suffered any damage, loss or injury on account of any negligence or wrongful conduct, the negligence or wrongful conduct which caused such damage, loss or injury was the negligence of plaintiff(s) in residing in, owning or possessing property located within Peninsula Drainage District No. 2 and in failing to take such steps as might be appropriate, by or through said Drainage District or otherwise, to provide adequate protection to their property, and in further failing to remove their property from said Drainage District prior to or during the high water period of May, 1948.

Tenth Defense

10. No act or failure to act of defendant or any agency or employee of defendant was the proximate cause of any damage, loss or injury to plaintiff(s).

Eleventh Defense

11. Defendant denies each allegation of the complaint except that defendant admits and alleges as follows: At all times mentioned in the complaint

the Federal Public Housing Authority (a constituent unit of National Housing Agency and created by Executive Order 9070 dated February 24, 1942) was an agency of the United States. At all such times the Corps of Engineers, Department of the Army, was an agency of the United States. On or about September 15, 1917, there was created pursuant to the laws of the State of Oregon, a drainage district known as Peninsula Drainage District No. 2, the boundaries of which were approximately as described in the complaint. Peninsula Drainage District No. 2 was separated from Peninsula Drainage District No. 1, the drainage district immediately to the west, by a highway fill supporting Denver Avenue. At all times mentioned in the complaint this fill was owned by the State of Oregon and controlled by the Oregon State Highway Department.

In late 1942 or early 1943, upon the advice and with the consent of the Oregon State Highway Commission, an underpass was built under Denver Avenue at a location where Denver Avenue separates the two drainage districts and shortly thereafter a semicircular embankment was constructed to surround the opening made in the Denver Avenue fill. Neither the United States nor any agency or employee of the United States constructed or at any time maintained the underpass beneath Denver Avenue nor the embankment surrounding that underpass.

In May, 1948, the Columbia River was in flood. On May 30, 1948, the western embankment of Penin-

sula Drainage District No. 1 failed and that district was flooded. In the evening of May 31, 1948, the ring embankment at the Denver Avenue underpass failed and Peninsula Drainage District No. 2 was flooded between Denver Avenue and Union Avenue. Later that night and on June 1, 1948, the embankment supporting Union Avenue also failed and the balance of the Drainage District was flooded.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint which relate to the occupancy of property by plaintiff(s), to the ownership of property by plaintiff(s), to damage, loss or injury to or destruction of property, or to the employment of attorneys by plaintiff(s) and on that ground defendant denies each such allegation.

Wherefore, defendant prays:

1. That plaintiff(s) take nothing by this action;

2. That the Court award to defendant its costs in this action and such further relief as to the Court may seem proper.

/s/ HENRY L. HESS,
United States Attorney;

/s/ JOHN R. BROOKE,
Ass't. United States Attorney;

/s/ WALKER LOWRY,
Special Ass't. to the Attorney General.

Service of Copy acknowledged.

[Endorsed]: Filed November 23, 1951.

[Title of District Court and Cause.]

Pre-Trial Order

A pre-trial conference was held in this and related cases on the 4th day of August, 1953, the Honorable James Alger Fee presiding. Plaintiffs appeared by their attorney, William C. Ralston. The United States appeared by its attorneys, Henry L. Hess, United States Attorney, and Walker Lowry, Special Assistant to the Attorney General.

Now, Therefore:

A. The parties have agreed and it is hereby ordered that the cases listed in Schedule A attached to this order shall be and they are hereby consolidated with this case. The consolidated cases all relate to claims for property damage at Peninsula Drainage District No. 2, Multnomah County, Oregon, arising out of the 1948 Columbia River Flood.

B. The parties have agreed and it is hereby ordered that the trial and determination of the amount, if any, of the damage suffered by the plaintiffs in the consolidated cases shall be postponed until there has been a trial court determination of whether or not the United States is liable to the plaintiffs for their damage if any.

C. For the purposes of the decision and disposition of these consolidated cases, but for no other purpose, the parties agree as follows:

Agreed Facts

1. The Columbia River.

The Columbia River has its source in Columbia Lake, British Columbia, 75 miles north of the international boundary. From its source the river flows northwesterly for a distance of 200 miles; it then turns and flows almost due south a distance of 260 miles to enter the United States near the northeast border of the State of Washington. From the international boundary to a point 15 miles below the mouth of the Snake River, a distance of 441 miles, the river flows in a southerly direction through the eastern part of the State of Washington; it then turns and flows westward a distance of 309 miles, forming a boundary between Oregon and Washington, to discharge into the Pacific Ocean at a point 160 miles south of the Straits of Juan de Fuca and 610 miles north of San Francisco Bay. The river has a total length of 1,210 miles, of which 750 miles are in the United States. The southern limits of its basin are in Nevada and the eastern boundary of the basin is the continental divide. The Columbia, with its tributaries, drains parts of seven states and a large part of British Columbia. The total area of the basin is approximately 259,000 square miles.

The maximum discharge of the Columbia River customarily occurs in early summer, usually in June. It results principally from the melting of snow in the Rocky Mountains and contiguous ranges from Yellowstone Park, Wyoming, on the south to

Mt. Robson Park, British Columbia, on the north. In the period from 1858 to 1947, there have been four occasions on which the flow of the river at The Dalles has exceeded 900,000 feet per second: In 1862, 1876, 1880 and 1894. From the mouth of the Snake to and through the Cascade Range, the river in general flows through a narrow valley or gorge. From the head of tidal waters near Bonneville to the sea, a distance of 142 miles, the bottom land areas vary in width from a few hundred feet to about six miles.

The Corps of Engineers of the United States Army has made the following formal reports relating to flood control and bank protection on the Columbia River: A report dated 1918 entitled "Carrolls to Stella, Washington"; a report dated 1926 entitled "Martin Bluff to Lewis River, Washington"; a report dated 1928 entitled "Bank Protection Between Ilwaco and Chinook, Washington"; a report dated 1931 entitled "Protection of Banks and Dikes to Prevent Shoaling by Erosion"; a report dated 1931 entitled "Columbia River and Tributaries"; a report dated 1935 entitled "Flood Control Report"; a report dated 1936 entitled "Columbia River and Tributaries"; and a report dated 1937 entitled "Preliminary Examination for Flood Control of Columbia River."

2. Site of Peninsula Drainage District No. 2.

Peninsula Drainage District No. 2 is situated in Multnomah County, Oregon. It lies approximately 107 miles above the mouth of the Columbia River

and approximately 5 miles above the confluence of the Columbia and Willamette Rivers. The general boundaries of Peninsula Drainage District No. 2 are: On the north, the Columbia River; on the east, an excavated channel known as the City Cut, which connects the Columbia River and Columbia Slough; on the south, Columbia Slough; and on the west, the highway fill supporting Denver Avenue. Denver Avenue marks the boundary between Peninsula Drainage District No. 2 and Peninsula Drainage District No. 1. During periods of high water in the Columbia River, water surrounds Peninsula Drainage District No. 2 on the north, east and south. The water on the east and south is backwater which carries no perceptible current.

Unless otherwise noted, the situation described in this agreed statement of facts existed during May and early June, 1948, and particularly on May 30, May 31 and June 1, 1948.

3. Elevation of Peninsula Drainage District No. 2.

The total area within Peninsula Drainage District No. 2 is approximately 1,425 acres. This area varies in elevation from 0 to 22 feet m.s.l., with most of the area below 15 feet m.s.l., and hence below average flood height in the Columbia River. In the absence of protecting embankments most of the area of the district would be inundated during periods of normal river flow but during periods of very low flow a substantial part of the area would be dry.

All references in this agreed statement of facts to

mean sea level are to mean sea level as fixed by the 1929 adjustment.

4. Drainage of Peninsula Drainage District No. 2.

The natural drainage of Peninsula Drainage District No. 2 is from east to west and from north to south. Drainage water is collected in sloughs and shallow ditches which converge on a pumping station located near the Columbia Slough levee in the southwesterly portion of the district. This is the main pumping station within the district and there is no way for drainage water to be removed from the district except through this station. The two pumps at the station transfer drainage water from the district to Columbia Slough. They have a total rated capacity of from 20,000 to 37,500 g.p.m. depending on the existing head.

5. Levee Work by Peninsula Drainage District No. 2.

Peninsula Drainage District No. 2 was organized on September 25, 1917, under the drainage district laws of the State of Oregon, and has ever since continued in existence. In June, 1917, the area west and immediately adjacent to Peninsula Drainage District No. 2 was organized as a drainage district known as Peninsula Drainage District No. 1. The highway fill supporting Denver Avenue was in existence in 1917, and that highway became the boundary between the two districts. During the period from 1917 to 1921, Peninsula Drainage District No. 2 built levees on the north, south and east. This levee

work was done by bucket and suction dredges. The materials to build the levees were taken from the Columbia River, from the city drainage canal and from Columbia Slough.

The district constructed the north levee to a minimum elevation of approximately 33 feet m.s.l., with a crown width averaging from 8 to 30 feet, and slopes of approximately 1 on 2 (one foot of vertical distance for every two feet of horizontal distance) and 1 on 3, to give a base width at the inside average ground level of from 60 to 100 feet or more. This north levee, together with the high ground which formed a portion of it, extended for approximately 10,384 feet eastward from Denver Avenue to the right bank of the city drainage canal. The levee was constructed by hydraulic methods. It was built of sand dredged from Columbia River and pumped to the site of the levee. The work was completed in 1921. That portion of the south levee between Denver Avenue and Union Avenue was built by Peninsula Drainage District No. 2 in 1917. Sandy silt was borrowed from Columbia Slough and installed at the levee site by bucket dredges. This levee section, approximately 6,500 feet in length, was constructed to a minimum elevation of approximately 33 feet m.s.l., with a crown width averaging from 8 to 10 feet and slopes of approximately 1 on 2, and 1 on 3, to give a base width at the inside average ground level of from 60 to 80 feet or more. The east levee of the district and that portion of the southern levee

east of Union Avenue were completed by Peninsula Drainage District No. 2 in 1921. These levees were constructed of sandy silt borrowed from Columbia Slough and the city canal and installed at the levee site by bucket dredges. The levees were constructed to the same dimensions as that portion of the south levee between Denver Avenue and Union Avenue.

The levees thus constructed by Peninsula Drainage District No. 2 were intended to provide protection against a flood in the Columbia River equal to the 1876 flood, the second highest then of record. The total cost to the district of constructing the levees was $131,767.61. Peninsula Drainage District No. 2 has no source of income other than assessments against the land included in the district. Funds to pay the cost of the levees were obtained in the first instance by bond issues. The bonds were redeemed by annual assessments against the district lands. The district now has and ever since its organization has had power to arrange for such assessments to provide funds for the construction or maintenance of levees which protect the district.

6. Levee Work by the Corps of Engineers.

In 1934 it was suggested to Congress that Federal funds should be expended to give additional flood protection to various areas within the Columbia River Basin, including Peninsula Drainage District No. 2. By an Act entitled "An Act to provide a preliminary examination of Columbia River and its tributaries in the State of Washington with a view

to control of its flood waters," approved June 13, 1934 (Public Law No. 339, 73rd Congress), Congress authorized the Secretary of War to make a preliminary survey of the Columbia River and its tributaries and make a recommendation to Congress as to the desirablility of expending Federal funds for flood control purposes. Pursuant to this authorization the Corps of Engineers prepared a report recommending, among other things, that the front and back levees of Peninsula Drainage District No. 2 be raised and strengthened. The Corps of Engineers found that at some points these levees had settled to the extent that the top of the levee was at or only slightly above the 1876 flood plane. By Section 5 of the Flood Control Act of 1936, 49 Stat. 1590, Congress authorized the War Department, under direction of the Secretary of War and supervision of the Chief of Engineers, to proceed with the work recommended by the Corps at an estimated cost of $287,-200 and with the local cooperation specified in the 1936 Act. The Peninsula Drainage District No. 2 project as thus proposed and approved provided for the restoration of the levees to provide a 3-foot freeboard above the level of a flood of the 1876 magnitude.

The work on the north levee consisted of the construction of approximately 956 feet of river-front concrete wall and the reconstruction of approximately 3,181 feet of earth levee and appurtenant work. The work on the south levee consisted of the reconstruction of approximately 2.20 miles of earth

levee. The work on the east levee consisted of the reconstruction of 1.32 miles of earth levee. The Peninsula Drainage District No. 2 levees as thus reconstructed were built to a mean sea level elevation of from 33.0 to 35.0 feet. The crown width of the north levee was 12 feet in the reconstructed section where the levee carried no road and from 20 to 30 feet in that portion of the levee where the levee carried a road. The crown width of the south levee as reconstructed was 12 feet. The riverward slopes of the north levee were not reconstructed except where revetments were placed. There the slopes were 1 on 2. The landward slopes of the north levee were constructed 1 on 3. On sections not reconstructed the slopes ranged from 1 on 2 to 1 on 4 to give an approximate width at the inside average ground level of 90 to 100 feet or more. Between Denver and Union Avenues the slopes of the south levee were 1 on 2 to give an approximate width at the inside average ground level of 70 feet or more. East of Union Avenue the landward slope of the south levee was made 1 on 3 to give a base width of 100 feet or more. The east levee had a riverward slope of 1 on 2 and a landward slope of 1 on 3 to give an approximate width at the inside average ground level of 100 feet or more. The east levee had a crown width of 12 feet. The north, south and east levees were all reconstructed from material taken from borrow pits outside of Peninsula Drainage District No. 2. This material was predominantly silt and clay. It was placed in the levee by draglines, trucks and carryalls. The construction work was

done by private contractors according to plans and specifications provided by the Corps of Engineers. The work of the Corps of Engineers on the levees was completed in 1940. Control of the levees was formally surrendered to Peninsula Drainage District No. 2 by sections as they were completed and the final release was made on August 2, 1944. The United States does not own and it has never owned the land upon which the levees are built. Subject to such contentions as may hereinafter be made with respect to the high water period of 1948, at no time subsequent to the time the levees were surrendered to Peninsula Drainage District No. 2 have these levees been controlled or maintained by the United States or by any agency or employee of the United States.

7. The Western Embankment at Peninsula Drainage District No. 2.

The western boundary of Peninsula Drainage District No. 2 is the highway fill which supports Denver Avenue. This fill was constructed in 1915 and 1916 by Multnomah County, Oregon, at the expense of the Interstate Bridge Commission, as one of the approaches to the interstate bridge which crosses the Columbia River from Oregon to Washington. The fill was constructed by hydraulic methods. A suction dredge pumped sand from Oregon Slough to the site of the fill. The fill was built at an elevation of approximately 37.6 feet m.s.l., with a crown width of approximately 92 feet (of which 56 feet were paved) and slopes of approximately 1 on 3 to give a width

at average ground level of 317.6 feet or more. This fill was built over a right-of-way conveyed to Multnomah County by the Peninsula Industrial Company under date of March 16, 1915. The deed was recorded in Book 687, Page 39 of the Multnomah County Deed Records. This deed conveyed a strip of ground 80 feet in width, but gave the County additional rights, including the right to place the toe of the slopes of any embankments on the adjoining real property belonging to the grantor together with the right to waste earth upon the said land wherever necessary by reason of any fill or other structure placed by said Multnomah County on the land conveyed, but provided further that nothing therein contained should be construed to convey any interests in the land of the grantor other than the 80 feet wide strip of land conveyed.

This deed contained the following condition:

"Provided, However, and this conveyance is made upon the following express conditions which are hereby declared and agreed to be conditions subsequent.

"(a) That the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained upon that part of the tract of land herein described as Parcel B, which is north of the north bank of Columbia Slough, a fill and embankment which shall as far as possible duplicate the fill and embankment to be constructed by said Multno-

mah County upon Parcel A as described herein, the west side line of the crown of said fill or embankment to coincide substantially with the west side line of said Parcel B and shall within said period provide and thereafter maintain a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover and if sufficient funds shall be available out of the proceeds of the so-called interstate bridge bonds of Multnomah County to pave said highway in substantially the same manner as the highway to be constructed over the said Parcel A herein described shall be paved then and within said period above prescribed said Multnomah County shall likewise pave the said highway to be constructed over the said Parcel B as herein described which pavement shall thereafter be maintained in the manner provided by law."

This deed also contained among other things the following reservation to the grantor and its successors in title:

"(e) The right to construct and maintain on any portion of the said two parcels hereby conveyed not occupied or at any time required or to be required by the roadway or roadways at any time to be constructed thereon by Multnomah County, such fills, embankments and roadways as the grantor or its successors shall determine and with the right in the said grantor, its successors or assigns, to occupy and use the same, which said fills, embankments and roadways may be supported in whole or in part by

any fill, embankment or structure constructed or maintained or either of said parcels by Multnomah County."

On or about June 1, 1917, Peninsula Drainage District No. 1 was organized and adopted Denver Avenue, then known as Derby Street, as its eastern boundary. At that time there was no protection for this district from waters from the east except the Denver Avenue or Derby Street fill. On September 25, 1917, Peninsula District No. 2 was organized and adopted Denver Avenue as its western boundary. The two districts placed a culvert approximately 5 x 5 through the Denver Avenue fill and adopted a common drainage system so that the waters would drain from District No. 2 through the drainage culvert to District No. 1 and there be pumped by a mutually owned pumping plant into Columbia Slough.

On December 31, 1926, a correction deed of the right-of-way was given by Peninsula Industrial Company to Multnomah County after the fill had been completed. This deed was given for the purpose of correcting the description of the prior deed, the fill having been built off of the original description. This deed also limited the area conveyed to a strip 80 feet in width and repeated and confirmed the restrictions and reservations in the prior deed. This deed is recorded in Book 182, Page 298 of the Multnomah County Deed Records.

Under date of March 26, 1928, the Board of Commissioners of Peninsula Drainage District No. 2

filed a petition for amendment of the plan of reclamation. Paragraph II of the petition reads as follows:

"The plan for reclamation heretofore adopted by and for said Peninsula Drainage District Number Two, provided for the construction of dikes and levees surrounding the District to an elevation of twenty-eight feet, and said dikes and levees have been constructed and completed in accordance with said plan for reclamation. The Derby Street approach to the Interstate Bridge, by which Peninsula Drainage District Number Two is now bounded and enclosed on the west, was constructed by the County of Multnomah to an elevation of thirty-three feet at the crown. The dikes and levees constructed by and enclosing Multnomah Drainage District Number One of Multnomah County, Oregon, situated immediately to the east of Peninsula Drainage District Number Two, are all constructed to an elevation of thirty-two feet at the top. Your petitioners have been informed by the engineer for Peninsula Drainage District Number Two that the dikes and levees enclosing said Peninsula Drainage District Number Two should all be constructed to an elevation of thirty-three feet; and various land owners in said District have made application to your petitioners as the Board of Supervisors of said District, to make provision for the construction of said dikes and levees to an elevation of thirty-three feet."

On May 19, 1928, an order was made by the Hon. Judge Tazwell, Judge of the Circuit Court, Probate Department for Multnomah County, confirming and approving the amended plan. The Court then appointed three (3) supervisors with authority to proceed to carry out the construction work provided by such plan and appointed three (3) commissioners to assess the benefits and damages to the property within the district. On August 22, 1928, the commissioners so appointed by the Court filed their report on which they found that no lands within the district would be damaged and all of them would be benefited equally and assessed the same at Twenty-five and no/100 ($25.00) Dollars per acre to cover the cost of this amended plan of improvement. Following improvements made to the levees under this reorganization plan, ending in the early 1930's, Districts Nos. 1 and 2 separated their drainage system. The culvert under Denver Avenue was plugged and Drainage District No. 2 drained its surplus waters to its south dike along the Columbia Slough, put in its own pumping plant and from that time on pumped its drainage waters over the dike into the Columbia Slough.

The Interstate Bridge Commission transferred control of the Denver Avenue approach to the interstate Bridge to Multnomah County on January 1, 1929. On March 26, 1937, the Oregon State Highway Commission took over control of Denver Avenue by resolution of the State Highway Commission and on that date Denver Avenue became an Oregon

State highway. Since then, Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department. Denver Avenue has been in regular use as a public highway since it was first constructed in 1915 or 1916. Neither the land on which said highway is located nor the fill itself, except that portion which rests upon private property and has been acquired by the United States as an adjoining owner, has ever belonged to the United States and (subject to such contentions as may hereafter be made with respect to the high water period of May, 1948) at no time has the fill ever been maintained or controlled by the United States or by any agency or employee of the United States.

In the latter part of 1943 or early in 1944, the Oregon State Highway Commission constructed a traffic interchange at the intersection of Denver Avenue and Union Avenue, filling in and utilizing the high ground from Denver Avenue to North Portland Road and from Union Avenue to North Portland Road in such a way that a levee and high ground to an elevation of approximately 31 feet separated Drainage Districts No. 1 and No. 2, and the protection, if any, afforded by the Denver Avenue fill was not affected except by a lowered elevation of approximately four feet.

In connection with the construction of this traffic interchange an underpass was constructed beneath Union Avenue which was not protected by stop logs or any other flood protection structure. The work

on this underpass by the Oregon State Highway Commission was completed March 23, 1944.

In 1944, the Oregon State Highway Commission constructed an underpass at the intersection of Denver Avenue and Columbia Slough, permitting traffic under Denver Avenue on Schmeer Road, and also built an access road at the same location, permitting traffic to continue north on Denver Avenue from Schmeer Road. At the time this underpass and access road were constructed, the levees of Peninsula Drainage Districts Nos. 1 and 2 were already in existence. The underpass was located on the north bank of Columbia Slough. In connection with the construction of the underpass, which was located south of the south levee of Peninsula Drainage District No. 1, the western end of the south levee of Peninsula Drainage District No. 2 was relocated slightly to the north of its former location. The underpass and access road on the east of the Denver Avenue fill were so constructed that the elevation of Denver Avenue was not affected and the serviceability, if any, of the Denver Avenue fill as a levee and protection against flood waters occurring in either Drainage District No. 1 or Drainage District No. 2 was not impaired. The work by the Oregon State Highway Commission in connection with the underpass was completed July 25, 1945.

8. The Levees of Peninsula Drainage District No. 1.

West of the highway fill supporting Denver Avenue lies Peninsula Drainage District No. 1. The levees of that district provide protection for Penin-

sula Drainage District No. 2 in the sense that in the absence of a failure of one or more of those levees, flood waters can not approach Peninsula Drainage District No. 2 from the west. The levees of Peninsula Drainage District No. 1 are described below.

a. The north and south embankments: Levee work by Peninsula Drainage District No. 1.

Peninsula Drainage District No. 1 was organized on June 1, 1917, under the drainage district laws of the State of Oregon, and has ever since continued in existence. In 1917, when the district was organized, the railway fills along the west side of the district were or were about to be constructed and those fills were then the only protective embankments for the district on the westerly side. The Denver Avenue fill was in existence in 1917, and that fill became the only protective embankment for the district on the easterly side. The Drainage District undertook the work of providing protection on the north and south sides. The north levee was originally located partly adjacent to and partly immediately behind (south of) the high ground paralleling Oregon Slough. This levee was constructed by hydraulic methods. Sand was dredged from Oregon Slough and pumped to the site of the levee. The levee was constructed to a minimum elevation of approximately 30 feet m.s.l., with a crown width averaging 10 to 12 feet and slopes of approximately 1 on 5 (one foot of vertical elevation for every 5 feet of horizontal distance) to give a base width at the inside average ground level of 50 feet or more.

The levee together with the high ground which formed a part of it extended for approximately 7,000 feet from Denver Avenue on the east to the railroad fills on the west. The levee work was completed by 1918.

The south levee was located along the right bank of and parallel to Columbia Slough. This levee was also completed by 1918. Material was borrowed from the Columbia Slough area and hoisted to the site of the levee. The levee was constructed to a minimum elevation of approximately 30 feet m.s.l., with a crown width averaging 8 feet and slopes of approximately 1 on 3 to give a base width at the inside average ground level of 70 feet or more. The levee was approximately 7,500 feet long. The levees thus constructed by Drainage District No. 1 were intended to provide protection against a flood in the Columbia River equal to the 1876 flood, the second highest on record at that time.

The total cost to the Drainage District of constructing these levees was $21,376.64. Peninsula Drainage District No. 1 has no source of funds other than assessments against the land included in the district. Funds to pay the cost of the levees were obtained in the first instance by the sale of bonds to Peninsula Industrial Company, one of the Swift companies. Funds to redeem the bonds were obtained by annual assessments against the land within the district at the rate of $7.00 per acre. The district now has and ever since its organization has had power to arrange for such assessments to provide

funds for the construction or maintenance of levees which protect the district.

In 1935 the Corps of Engineers, at the direction of Congress, investigated and reported to Congress on the condition of levees along the Columbia River, including those constructed by Peninsula Drainage District No. 1. They had then settled to such an extent that in some places the top of the levee was from 0.5 to 1.5 feet below the 1876 flood plane. In the judgment of the Engineers they were also of insufficient section to provide the protection for which they were intended.

b. The north and south embankments: Levee work by the Corps of Engineers.

In 1934 it was suggested to Congress that Federal funds should be expended to give additional flood protection to various areas within the Columbia River basin, including Peninsula Drainage District No. 1. By an Act entitled "An Act to Provide a Preliminary Examination of Columbia River and its Tributaries in the State of Washington, with a View to the Control of Its Flood Waters" approved June 13, 1934 (Public Law No. 339, 73rd Congress), Congress authorized the Secretary of War to make a preliminary survey of the Columbia River and its tributaries and make a recommendation to Congress as to the desirability of expending Federal funds for flood control purposes. Pursuant to this authorization, the Corps of Engineers prepared a report recommending, among other things, that the

north and south levees of Peninsula Drainage District No. 1 be raised and strengthened. By Section 5 of the Flood Control Act of 1936 (49 Stat. 1590) Congress authorized the War Department, under direction of the Secretary of War and supervision of the Chief of Engineers, to proceed with this work at an estimated cost of $133,300 and with the local cooperation specified in the Act. The Peninsula Drainage District No. 1 project as thus proposed and approved did not include protection for the industrial plants situated on the northerly strip of high ground paralleling Oregon Slough. This was for the reason that the north levee as constructed by Peninsula Drainage District No. 1 was partly behind rather than in front of this high ground. In order to provide protection to the high ground and the industrial plants located upon it, the project for Peninsula Drainage District No. 1 was amended and a project report revised accordingly and dated April 25, 1940, was approved by the Chief of Engineers and by Peninsula Drainage District No. 1.

The flood protection structures for Peninsula Drainage District No. 1 authorized by Congress and the work undertaken by the Corps of Engineers and approved by Peninsula Drainage District No. 1 was confined entirely to the north and south levees of the district. The work done on the north consisted of the construction of approximately 0.45 miles of river front concrete wall and approximately 0.74 miles of earth levee and appurtenant work. The work done on the south consisted of the reconstruc-

tion of approximately 1.4 miles of earth levee, thereby raising the existing levee from 3 to 6 feet. These levees were constructed to a mean sea level elvation of from 34.7 to 34.9 feet. The crown width of the north levee varied from 6 to 12 feet. The crown width of the south levee was 12 feet and it was approximately 25 feet above average ground level on the landward side. The riverward and landward slopes of the north levee ranged between 1 on 1½ to 1 on 3 to give an approximate width at the inside average ground level of 44 feet or more. The south levee had a riverward slope of 1 on 2½ and a landward slope of 1 on 3 to give an approximate width at the inside average ground level of 150 feet or more. The levees were reconstructed from material taken from borrow pits within Peninsula Drainage District No. 1. This material was predominantly silt and clay. It was hauled to the levee sites by trucks or carryalls. The construction work was done by private contractors according to plans and specifications established by the Corps of Engineers.

The work of the Corps of Engineers on the levees was completed in 1941. Control of the levees was formally surrendered to Peninsula Drainage District No. 1 on September 15, 1941. Subject to the rights, if any, which the United States acquired by virtue of the condemnation proceeding begun on November 4, 1942, in the District Court of the District of Oregon, Civil No. 1604, neither the land on which these levees are situated nor the levees them-

selves belong to or have ever belonged to the United States. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, at no time subsequent to September 15, 1941, have these levees been controlled or maintained by the United States or any agency or employee of the United States.

c. The western embankment: The Union Pacific fill.

Between Peninsula Drainage District No. 1 and lands on the west subject to flood are located the railroad fill of the Spokane, Portland & Seattle Railway Company, the railroad fill leased by Union Pacific Railroad Company from Oregon-Washington Railroad & Navigation Company and the highway fill supporting North Portland Road. The Union Pacific fill extends northerly from Columbia Slough levee a distance of approximately 3,200 feet to where it joins the fill of the Spokane, Portland & Seattle Railway Company. Between this point of junction and the Columbia Slough levee flood waters can bypass the S. P. & S. Ry. Co. fill and hence in this area, the Union Pacific fill alone prevents flood waters from reaching Peninsula Drainage District No. 1. North of the point of junction a single structure consisting of the combined railroad fills and the highway fill supporting North Portland Road is between the District and lands on the west subject to flood. It is this structure north of the point of junction which failed on May 30, 1948.

The Union Pacific fill south of the point of junction with the Spokane, Portland & Seattle Railway

Company fill has a crown width of approximately 24 feet, an average height of approximately 30 feet above average inside ground level and slopes of approximately 1 on 1¾ to give the fill an average ground level width of 130 feet or more. This southerly fill was constructed between July, 1909, and April, 1911, by the Oregon & Washington Railroad Company, the predecessor in interest of the Oregon-Washington Railroad & Navigation Company from whom the Union Pacific Railroad Company leases the fill and the tracks which it carries. Prior to the construction of the fill, which began in 1909, the tracks of the railroad were carried over the same site by a trestle. This trestle was constructed between February and September, 1908. The present fill was created by dumping material down through and over the trestle. The stringers of the trestle were removed but the piling was not. According to the best available information the material used to make the fill came from the portal area of the Peninsula tunnel. It was predominantly a sandy loam with some clay content.

North of the point of junction of the Union Pacific Railroad Company fill with the Spokane, Portland & Seattle Railway Company fill, the combined fill continues for a distance of about 1,000 feet. At this point a fill supporting tracks of Spokane, Portland & Seattle Railway Company, Union Pacific Railroad Company (as lessee), and Peninsula Terminal Company, begins to turn eastward toward the industrial plants located on the high ground which

constitutes the northerly portion of Peninsula Drainage District No. 1. The Spokane, Portland & Seattle Railway Company fill continues in a northerly direction to Oregon Slough.

According to best information now available that portion of the fill supporting the Union Pacific track which constitutes a single structure with the fill of the Spokane, Portland & Seattle Railway Company (and which includes the portion through which flood waters passed on May 30, 1948), was constructed some time between 1910 and 1918 by the same method which was used to construct the southern portion of the Union Pacific fill. The fill was built by dumping material of a sandy nature over and through an existing trestle. The trestle stringers were removed but the piling was not. This fill rests on land belonging in undivided interests to the Spokane, Portland & Seattle Railway Company and the Northern Pacific Railway Company. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, the fill is and always has been owned, maintained and controlled by one or more of the railroad companies.

The entire fill carrying the Union Pacific tracks has been in daily use since it was first constructed. The daily volume of traffic has averaged between one and twenty trains. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, the fill has never subsided, caved or sloughed off and maintenance has

consisted entirely of normal ballasting and normal track maintenance.

d. The western embankment: The Spokane, Portland & Seattle Railroad Company fill.

From the junction of the Union Pacific Railroad Company fill with the Spokane, Portland & Seattle Railway Company fill north to the Oregon Slough levee is approximately 3,550 feet. Flood protection in this area is provided to Peninsula Drainage District No. 1 by a single structure consisting of the railroad company fills and the fill carrying North Portland Road.

Construction of the Spokane, Portland & Seattle Railway Company fill was commenced in 1907 as part of the original construction of that railroad. The fill was built to carry the main line tracks of the railroad part of the way from the high ground north of Columbia Slough to the bridge across Oregon Slough. The distance across this low area is approximately 8,415 feet. From 1907 to 1918 the railroad was carried across this area in part by a fill and in part by trestlework. The southern 5,960 feet (which includes the area that failed), were filled; the next 2,105 feet to the north were trestlework; the last 350 feet were filled. The trestle was required because in 1907 when the railroad was built the area east and upstream of the railroad right of way was not protected from flood during high water of the Columbia River. Thus provision had to be made to permit drainage of that area as the river subsided to normal flow.

The material which was used to construct the 1907 fill was obtained from St. John's cut. It was almost entirely sand. The fill was built by first constructing a work trestle either along the central portion or along one side of the site of the proposed fill. Material was then transported by rail from St. John's cut and dumped through and over the work trestle. The trestle piling was not removed. The stringers were removed. The fill was constructed to an elevation of approximately 46.37 feet m.s.l., with an average crown width of 32 feet and slopes of 1 on 1¾ to give an approximate base width at average inside ground level of 172 feet or more. The construction work was done by contractors holding contracts with the Spokane, Portland & Seattle Railway Company and it took place in 1907 and 1908. The work trestle was not intended to and never did carry ordinary railroad traffic. Upon completion of the fill and the removal of the trestle stringers the entire weight of the rail traffic rested on the fill and not the trestle. The fill as thus constructed in 1907 and 1908 extended from the high ground north of Columbia Slough to a point 2,455 feet south of the southern abutment of the Oregon Slough railroad bridge. It was a section of this fill which failed on May 30, 1948.

In 1918 the trestlework to the north of the 1907 fill was filled, partially by hydraulic methods. Sand was dredged from Oregon Slough and pumped over and through the trestle, which was not removed, until the fill reached an elevation of approximately 28

feet m.s.l. To complete the fill to its final elevation of approximately 46.37 feet m.s.l., material was rail hauled from St. John's cut and dumped over and through the trestle. The material was almost entirely sand. The trestle piling was not removed but the stringers were removed. The fill as completed had an average crown width of 32 feet and slopes of 1 on 3 riverward and 1 on 1½ landward to create an average base width at average inside ground level of 131 feet or more.

The entire Spokane, Portland & Seattle Railway Company fill is situated on land owned by that company and the Northern Pacific Railroad Company as tenants in common. A two-thirds interest in the land is owned by the Spokane, Portland & Seattle Railway Company and a one-third interest by the Northern Pacific Railway Company. The fill itself is owned in the same portions by the same companies. Subject to such contentions as may hereinafter be made with respect to the May, 1948, high water period, the fill is and has always been controlled and maintained by the Spokane, Portland & Seattle Railway Company.

The fill is located on the main line of the Spokane, Portland & Seattle Railway Company and it has been in daily use since it was first constructed. Detailed traffic records are not available for the early years but from 1910 when railroad operations began until 1936, an average of not less than 14 passenger trains went across the fill each day, each train weighing an average of from 650 to 1,000 tons. There was in addition a daily movement of freight trains each

weighing an average of between 500 to 2,000 tons. From 1936 to 1942, an average of not less than 20 trains crossed the fill each day, each weighing an average of at least 1,000 tons. From 1942 to date, the fill has carried an average of 45 trains a day, each weighing an average of 1,500 tons.

The detailed train records of the Spokane, Portland & Seattle Railway Company show that during the period from May 15 to and including June 15, 1946, 1,442 trains crossed the fill, weighing a total of 2,526,013 tons. For the same period during 1947, 1,590 trains crossed the fill, weighing a total of 2,951,214 tons. Subject to such contentions as may hereinafter be made with respect to the high water period of May, 1948, the fill has never subsided, caved or sloughed off and maintenance has consisted entirely of normal ballasting and normal track maintenance.

e. The western embankment; North Portland Road.

Immediately to the west of the fill of the Spokane, Portland & Seattle Railway Company is the highway fill supporting North Portland Road. On May 30, 1948, and for several years prior thereto, this fill was separated from the fill of the Spokane, Portland & Seattle Railway Company by a depression 5 or 6 feet deep and 8 to 10 feet wide. The depression did not extend to the original natural ground level and below the surface of the depression the highway fill and the railroad fill joined to constitute a single structure.

This highway fill was constructed in 1933 by Multnomah County, Oregon. The fill was constructed by

hydraulic methods. Sand was dredged from Oregon Slough and pumped to the site of the fill. North Portland Road between Columbia Slough and Oregon Slough lies on a slight grade; hence the elevation of the fill varies from place to place. At the point where the fill failed on May 30, 1948, it had an elevation of 29.9 feet m.s.l., a crown width of 34 feet and slopes of 1 on 5 to give a width to the fill of approximately 83 feet at the point where it joined the Spokane, Portland & Seattle Railway Company fill, and a width at the base of the fill of approximately 175 feet.

The fill and the right of way to maintain it were transferred by Multnomah County to the State of Oregon on September 27, 1933. The fill has ever since been maintained and controlled by the Oregon State Highway Department. In 1933, that Department paved the fill to a width of approximately 22 feet with 7 to 9 inches of concrete. The concrete was laid on a layer of clay one foot thick. The land on which the fill is located does not belong to the United States. Subject to such contentions as may hereinafter be made with respect to the May, 1948, high water period, neither the United States nor any agency or employee of the United States has ever controlled or maintained the fill.

North Portland Road has been in daily use since 1933. Detailed traffic figures are available for the period subsequent to 1939, and they show that traffic over the fill has averaged 1,500 cars per day. The fill has never subsided, caved or sloughed off and

only normal highway maintenance has been required.

9. Comparison of Levee Elevations.

The north or river front levee of Peninsula drainage District No. 2, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	0/19 to 32/00	34.6
Levee	32/00 to 41/16	34.0
Floodwall	41/16 to 44/62	33.8
Levee	44/62 to 73/50	33.9
Floodwall	73/50 to 79/60	33.9
Levee	79/60 to 104/50	33.0

The south or back levee of Peninsula Drainage District No. 2, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	104/50 to 133/00	35.00
Levee	133/00 to 160/00	34.9
Levee	160/00 to 191/00	34.8
Levee	191/00 to 215/00	34.7
Levee	215/00 to 250/00	34.6
Levee	250/00 to 285/00	34.5

The north or river-front levee of Peninsula Drainage District No. 1, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	2/25 to 20/50	34.9
Levee	20/60 to 36/53	34.8
Floodwall	36/53 to 41/00	34.8
Floodwall	41/00 to 50/80	34.7
Levee	50/80 to 61/55	34.7

The south or back levee of Peninsula Drainage District No. 1, after the reconstruction work by the Corps of Engineers, had a mean sea level elevation from station to station as follows:

Nature of Structure	Station	Elevation in Feet
Levee	125/50 to 150/50	34.7
Levee	150/50 to 175/50	34.8
Levee	175/50 to 200/00	34.9

As indicated above, the lowest point in the levee system of Peninsula Drainage District No. 2 was 1.7 feet below the lowest point in the levee system of Peninsula Drainage District No. 1.

10. Flood Crests in Prior Years.

Records are available at Vancouver, Washington, recording flood crests in the Columbia River since 1901. The ten highest flood crests for the period from 1901 to 1948, and the date of each are listed below:

Year	Flood Crest m.s.l. (1929 adjustment)
1948 June 1, 13, 14	32.4
1933 June 19	27.7
1928 May 31	27.6
1921 June 12	27.4
1903 June 16-17	27.0
1916 July 3-6	26.7
1917 June 22	26.7
1913 June 13	26.6
1927 June 18-20	26.1
1922 June 11	25.6

Records for the Portland guage on the Willamette River are available for the period since 1876. The ten highest flood crests for the period from 1876 to

1948, and the date of each, are set forth below, together with an indication as to whether the flood was principally in the Willamette or Columbia Rivers.

Year	Flood Crest m.s.l. (1929 adjustment)	River
1894 June 7	34.2	Columbia
1948 June 1, 14	31.1	Columbia
1876 June 24	29.4	Columbia
1880 July 1-2	28.5	Columbia
1882 June 14-16	27.3	Columbia
1887 June 21	26.9	Columbia
1933 June 13	26.0	Columbia
1928 May 31	25.6	Columbia
1921 June 12, 13	25.5	Columbia
1899 June 23	25.4	Columbia

11. The Construction of Vanport.

Vanport, a war housing project belonging to the United States and located within Peninsula Drainage District No. 1, was constructed for the purpose of providing housing for persons engaged in war work in the Portland, Oregon-Vancouver, Washington, area, and particularly for employees of the three shipyards in that area operated by Kaiser Company, Inc. Vanport was within three miles of each of the three yards.

In the summer of 1942, the Kaiser yards were employing approximately 46,000 persons. Kaiser Company, Inc., expected to expand the operation of the yards and to employ in that connection a total of about 97,000 men. It therefore became necessary to provide housing for the new employees. Since existing facilities in the Portland area were already overburdened, Kaiser Company, Inc., proposed to

the United States Maritime Commission, an agency of the United States, that the company construct with funds to be provided by the Maritime Commission, 10,000 dwelling units in the Portland-Vancouver area, at an estimated cost of $21,905,400. Of these units, 4,000 were to be located in or near Vancouver, Washington, and 6,000 were to be located in the Portland area. The site proposed by Kaiser Company, Inc., for the 6,000 Portland units was the Vanport site. Kaiser Company, Inc., then held an option to buy 640 acres within Peninsula Drainage District No. 1, and it was proposed that 300 of the 640 acres be used for the housing project. The Kaiser proposal was submitted to the Maritime Commission in July, 1942.

In July, 1942, National Housing Agency, an agency of the United States (created by the President of the United States by Executive Order 9070 dated February 24, 1942), with authority to provide war housing, had no funds available for the Vanport project. It was anticipated that funds for that purpose would become available about September 15, 1942. The Maritime Commission, because of the urgent need for war shipping, was unwilling to delay construction of the Vanport housing until that date. Accordingly, an arrangement was made between the Maritime Commission, National Housing Agency and Kaiser Company, Inc., whereby the Maritime Commission authorized Kaiser Company, Inc., to proceed immediately with the construction of 6,000 units at the Vanport site, at an estimated

cost not to exceed $13,200,000. It was understood that when Congress provided funds to the National Housing Agency, a formal contract for the construction of the housing would be executed between the National Housing Agency and Kaiser Company, Inc., and that upon the execution of that contract the arrangement between the Maritime Commission and Kaiser Company, Inc., would be cancelled.

These steps were taken as planned. Funds were made available by Congress to the National Housing Agency and thereafter a contract was made between the United States represented by the Federal Public Housing Authority (a constituent unit of National Housing Agency and created by Executive Order 9070 dated February 24, 1942), and Kaiser Company, Inc., whereby Kaiser Company, Inc., agreed on a cost-plus-a-fixed-fee basis to construct the Vanport housing. The contract was executed as of August 1, 1942. Kaiser Company, Inc., in turn subcontracted the construction work to two Portland construction contractors, George H. Buckler and Charles B. Wegman.

Dwelling units at Vanport first became available for occupancy on or about December 15, 1942. The construction of Vanport was substantially completed by August 6, 1943. As completed, Vanport consisted of approximately 1,000 buildings containing approximately 10,000 dwelling units, together with commercial facilities, administrative offices, service annexes and social, recreational and community facilities. The dwelling units at Vanport were fur-

nished at the expense of the United States and the furnishings belonged to the United States. The cost to the United States of constructing and furnishing Vanport, including the cost of the land, was approximately $25,750,000. The land on which Vanport was built was acquired by the United States from Kaiser Company, Inc., and others by a condemnation proceding filed in this Court on November 4, 1942.

By an instrument effective as of October 15, 1942, and numbered HA (ORE-35053) mph 101, the United States, acting through the Federal Public Housing Authority, made an arrangement concerning Vanport with the Housing Authority of Portland. Thereafter and on April 12, 1943, these parties entered into a second agreement numbered HA (ORE-35053) mph 102 whereby the instrument of October 15, 1942, was rescinded as of the date of its execution and the instrument of April 12, 1943, substituted in its place. This second instrument continued in effect until the parties on February 17, 1944, executed a new instrument numbered HA (ORE-35021) mph 102 which became effective as of January 1, 1944. This instrument of February 17, 1944, related not only to the premises at Vanport but to other premises as well. It was in effect in May and June, 1948, and thereafter.

12. Construction of Denver Avenue Underpass and Ring Levee.

On August 28, 1942, John E. Mead, Housing Administrator of the Oregon Shipbuilding Corpora-

tion, a company affiliated with Kaiser Company, Inc., wrote to the Oregon State Highway Commission advising the Commission that Kaiser Company, Inc., was constructing a housing project adjacent to Denver Avenue and requesting the highway department to build entrance roads to the project from Denver Avenue by means of an underpass. On September 1, 1942, R. H. Baldock, Chief Engineer of the Oregon State Highway Commission, replied to Mr. Mead stating that the Highway Commission would be pleased to design the underpass and arrange for its construction providing that federal funds were made available to pay for the work. In accordance with this suggestion, the Highway Commission prepared and furnished to Kaiser Company, Inc., detailed plans and specifications for the construction of the underpass. The underpass was constructed in accordance with these plans and specifications.

By an instrument dated October 20, 1942, Kaiser Company, Inc., subcontracted the work of building the Denver Avenue underpass to Tower Sales & Erecting Company, a corporation doing construction in Portland. Tower Sales & Erecting Company in turn made arrangement to have part of the work done by the R. A. Heintz Construction Company of Portland and by Berke Bros. Construction Company of Portland. The actual construction work on the underpass began on or about November 2, 1942, under the supervision of Lowell A. Johnston,

an engineer employed by the Oregon State Highway Commission. It was Mr. Johnston's responsibility to see to it that the underpass was constructed in accordance with the plans and specifications prepared by the Oregon State Highway Commission. The work on the underpass was completed in February or March, 1943.

The original construction of the ring levee began on or about February 19, 1943. The work was done by the contractors working on the Denver Avenue underpass and particularly by Berke Bros. Construction Company. The work continued during March and part of April, 1943. The ring levee was constructed from sand hauled from Sand Island on the Columbia River. The site of the levee was staked out and the sand was dumped at the staked location by trucks which circled the levee. After it was dumped from the trucks, the sand was pushed into place by two D-8 caterpillar bulldozers, each weighing approximately 50,000 pounds. A caterpillar motor grader with a number 12 blade, weighing approximately 23,000 pounds assisted in leveling the sand. The levee was built in six inch lifts, that is, the sand was spread in six inch layers and compacted by the movement of the bulldozers and other equipment across it. The work on the structure was completed in April, 1943.

In the fall of 1943, George H. Buckler, one of the Vanport contractors, made arrangements with Fred Christensen, a Portland contractor, to raise the elevation of the ring levee to 34.9 feet, to widen

its top to a width of 12 feet and to lay a clay blanket on the eastern or outside slope of the levee. During August and September, 1943, Mr. Christensen did this work on the ring levee in accordance with plans furnished him by Kaiser Company, Inc.

The ring levee as thus completed was approximately 800 feet long. Its crown width beginning with its junction with the Denver Avenue fill on the north and continuing for approximately 300 feet was 12 feet. Thereafter the crown width of the levee gradually decreased until at station 4 + 50 (that is, 450 feet from the northern end of the levee) the crown width was 7.5 feet. This crown width continued to the southern end of the levee. The inside or western slope of the levee was 1 on 2; the outside slope was 1 on 1½. The entire structure was completed to an elevation of 34.9 feet m.s.l. The average base width at average ground level of the levee structure itself was approximatly 100 feet. Beginning, however, approximately 50 feet from the northern end of the structure the inside slope joined with the fill which had been constructed to support the double roadway leading east through the underpass and circling up to Denver Avenue. This double roadway had a total crown width of approximately 55 feet. It was built on a grade so that in a distance of approximately 900 feet the elevation of the roadway rose from about 20 feet m.s.l., where it left the underpass, to 34.9 feet m.s.l. where it joined Denver Avenue. At the point where the crown width of the ring levee was reduced from

12 to 10.5 feet, that is approximately 300 feet from the northern end of the levee, the roadway was within 7 feet of the top of the levee. At approximately 450 feet from the northern end of the levee, where its crown width was reduced to 7.5 feet, the roadway was within 5 feet of the top of the levee and it continued to rise. The fill supporting the roadway was constructed in March and April, 1943. The material used in the construction was sand obtained in part from the underpass cut through Denver Avenue and in part from Sand Island. The roadway fill had a base width of approximately 70 feet to give a total base width for the levee itself plus the roadway of approximately 150 feet. The outside or eastern slope of the ring levee was covered with a blanket of clay three feet thick. The clay was obtained from an excavation in connection with a housing project on North Interstate Boulevard in the Portland area. It was hauled by trucks to the site of the ring levee and dumped and graded into place. Approximately 8,425 yards of clay were used for the clay blanket on the eastern slope of the levee.

The plans prepared by the Oregon State Highway Commission for the construction of the Denver Avenue underpass and the roadways connected with it called for the installation of an 18-inch culvert beneath the roadway which circled from the underpass up to Denver Avenue. The drainage of this culvert was from west to east and its purpose was to drain the area enclosed by the roadway. The culvert was

installed under the supervision of the Oregon State Highway Commission. When the ring levee was constructed the culvert was extended a short distance on its eastern end. There it joined a 24-inch culvert which roughly paralleled Denver Avenue on the east and which was part of the drainage system for Peninsula Drainage District No. 2. There was a manhole at the junction of the two culverts. This manhole was a short distance, approximately 20 feet, each of the eastern toe of the ring levee. The 18-inch culvert was provided with a flood gate on its eastern end. The purpose and effect of this flood gate was to prevent flood waters in Peninsula Drainage District No. 2 from flowing through the culvert into the underpass area and on into Peninsula Drainage District No. 1. There was no flood gate on the western end of the culvert.

About a hundred feet south of the underpass through Denver Avenue a wooden culvert approximately 5 feet by 5 feet in size passed through the fill supporting Denver Avenue at about ground level. This culvert was installed in the course of the original construction of the Denver Avenue fill. At some later date some person or persons whose identity is not known plugged the ends of this culvert.

13. Repair Work on the Ring Levee.

In the spring of 1944, employees of the Housing Authority of Portland, inspecting the ring levee, observed that cracks and sloughs had developed in

portions of it. Arrangements were then made for employees of the Housing Authority to make a detailed inspection of the condition of the levee, an inspection in which representatives of the Portland office of the Corps of Engineers participated. It was found that the crown of the levee had settled to some extent; that several cracks had developed in the crown, some of them from eight to ten inches wide and extending into the levee two or three feet or more; and that portions of the outside or eastern slope of the levee had sloughed off. This condition was reported to the management of the Housing Authority of Portland and to representatives of the Federal Public Housing Authority. In the summer or fall of 1944, the ring levee was repaired by employees of the Housing Authority of Portland who capped the crown, reworked the areas where sloughs had occurred and filled in the cracks. In the areas in which sloughs had taken place, the outside slope of the levee was extended three or four feet at the toe and the material reworked to that depth up to the crown. The cracks in the crown were filled with earth which was tamped into place; and over the entire crown of the levee a cap of earth a few inches in thickness was installed. As far as is now known, no further sloughs or cracks developed in the levee, no further settlement took place, and no further work was done on it at any time prior to its failure in the high water period of 1948. During the intervening period, that is, from the fall of 1944, until the levee failed, routine inspections of the ring levee were made by representatives of the

Housing Authority of Portland who saw no change in its condition.

14. Union Avenue.

Union Avenue crosses Peninsula Drainage District No. 2 from the northwest corner of the district (where it joins with Denver Avenue) to a point on the south side of the district about 6,500 feet east of Denver Avenue. Union Avenue is one of the approaches to the Interstate Bridge across the Columbia River. It is supported by a fill which was constructed in 1915 and 1916 by Multnomah County, Oregon, at the expense of the Interstate Bridge Commission. The fill was constructed by hydraulic methods on land belonging to Multnomah County. Suction dredges pumped sand from Oregon Slough to the site of the fill. The Union Avenue fill was built to an elevation of approximately 36.6 feet m.s.l. with a crown width of approximately 42 feet (of which approximately 32 feet were paved) and slopes of approximately 1 on 1½ to give a width at average ground level of approximately 125 feet.

The Interstate Bridge Commission transferred control over the fill to Multnomah County, Oregon, and Multnomah County in turn transferred the fill and the land on which it rests to the State of Oregon on January 16, 1931. Since then the fill has always been and now is owned by the State of Oregon and controlled by the Oregon State Highway Department. Neither the land on which the fill is

located nor the fill itself belongs to or has ever belonged to the United States and (subject to such contentions as may hereinafter be made with respect to the high water period of May and June, 1948) at no time has the fill ever been maintained or controlled by the United States or by an agency or employee of the United States. Since March 1, 1931, Union Avenue has been an Oregon state highway.

Two culverts were constructed through the fill which supports Union Avenue. The northern culvert located about 3600 feet southeast of the junction between Denver and Union Avenues was a 60-inch metal culvert installed through the fill in 1919 or thereabouts in a drainage ditch located a few feet below normal ground level. The southern culvert located about 4500 feet southeast of the junction between Union and Denver Avenues was a 48-inch concrete culvert installed through the fill in a drainage ditch located a few feet below normal ground level by Peninsula Drainage District No. 2, with the consent of the Oregon State Highway Commission, in 1938 or 1939. The northern culvert was equipped with a flood gate on the western end. The southern culvert had no flood gate on either end. The purpose of the culverts was to permit drainage water to flow from the area east of Union Avenue through the Union Avenue fill and on to the pumping station located in the southwest corner of the district.

15. Construction of East Vanport.

East Vanport, a war housing project, was constructed in 1943 and 1944, on a location within Peninsula Drainage District No. 2 and near Denver Avenue. The project, its furnishings and the land on which it was constructed all belonged to the United States. Construction of the project began on October 4, 1943; the project buildings were first occupied on January 8, 1944; and construction was completed on March 21, 1944. East Vanport was constructed by Oregon Ship Building Corporation, a company affiliated with Kaiser Company, Inc., on a cost-plus-a-fixed-fee basis. The total cost of the project to the United States, including the cost of the land, was $1,912,452. The project, as completed, contained 484 dwelling units, a community building and a commercial center. East Vanport was among the projects included in the so-called master lease from the United States to the Housing Authority of Portland, dated February 17, 1944, and effective as of January 1, 1944.

East Vanport was intended to provide temporary housing only. The project was terminated for war housing purposes as of February 11, 1946. Beginning on August 12, 1946, the dwelling units at East Vanport were moved to other communities. Except for twenty units which remained on the properties and were destroyed by the Columbia River flood of May and June, 1948, all the structures at East Vanport were removed on or before October 7, 1946.

16. Land Acquisition by the United States.

The United States on January 12, 1943, filed in this Court a petition for condemnation of 4.22 acres of land in the area of the Denver Avenue underpass and by order of court obtained immediate possession of the property. On May 24, 1943, the petition was amended to include an area of 4.23 acres, and on September 15, 1943, the petition was again amended so that the total area to which it referred was 4.53 acres.

On January 7, 1944, the United States filed a petition for condemnation of, and obtained immediate possession of the land, consisting of 136.11 acres, on which East Vanport was constructed. On June 16, 1944, title to both parcels, that is, the Denver Avenue underpass area and the East Vanport area, was confirmed in the United States by order of this Court. In 1949 and 1950 the United States quitclaimed this land to the City of Portland, subject to a dedication of a portion of the property to the State of Oregon for highway purposes. The ring levee surrounding the Denver Avenue underpass was built on property acquired by the United States in the condemnation proceedings described above.

17. The Relation Between the United States and the Housing Authority of Portland.

Since the repair work on the ring levee was done by employees of the Housing Authority of Portland, the relation between that authority and the United States is or may become important to this litigation. That relation is described below.

a. The Organization of the Housing Authority of Portland.

The Housing Authority of Portland was created on December 11, 1941, by resolution of the City Council of Portland, Oregon, acting under the authority of the Oregon State Housing Authorities Law. In accordance with the provisions of that statute the mayor of Portland appointed five commissioners (later increased to seven upon an amendment of the statute) to manage and direct the Authority. For some years prior to 1941, civic leaders in Portland, and particularly those connected with the Portland Housing and Planning Association, had been giving attention to the local housing situation and the desirability of providing residents with low rent housing. With the development in Portland of defense and war industries, particularly ship construction, it became apparent that some affirmative action was required. The Housing Authority of Portland (HAP) was created in response to this situation.

The persons who served as commissioners of HAP prior to January 1, 1950, and their terms of office, are as follows:

Commissioner	Appointed			Expiration
C. M. Gartrell	12/11/41	Resigned	9/ 1/44	12/11/46
Sanford E. Norby	9/ 1/44	Resigned	1/ 7/49	12/11/51
	1/15/47			
Mrs. Ralph W. Rasmussen	1/10/49			12/11/51
Maria C. Jackson	12/11/41	Resigned	4/14/42	12/11/42
Charles B. Wegman	4/15/42	Resigned	9/12/42	
Harry T. Capell	9/14/42			
	12/11/42	Deceased	10/ 8/45	12/11/47
Charles S. Camplan	10/26/45			
	12/12/47			12/11/52
Herbert J. Dahlke	12/11/41			12/11/43
	12/11/43			12/11/48
	12/29/48			12/11/53
Delmore E. Knickerson	12/11/41	Deceased	6/30/44	12/11/45
H. J. Detloff	7/27/44			12/11/45
	12/20/45			12/11/50
Chester A. Moores	12/11/41			12/11/44
	12/11/44	Resigned	12/17/45	12/11/49
Lamar Tooze	12/20/45	Resigned	12/11/49	12/11/49
Alfred H. Corbett	12/19/49			12/11/54
J. J. Gard	4/ 6/49			3/20/53
Rev. Thomas J. Tobin	4/ 6/49			3/20/54

The HAP commissioners in all instances have been Portland residents prominent in municipal affairs and familiar with housing problems. The commissioners serve without pay.

The persons who served as officers of HAP prior to January 1, 1950, and their terms of office, are as follows:

Chairman	Vice-Chairman	Secretary-Treasurer
C. M. Gartrell 12/11/41 to 9/ 1/44	Chester A. Moores 12/11/41 to 9/ 7/44	Harry D. Freeman 12/30/41 to 4/15/50
Chester A. Moores 9/ 7/44 to 12/17/45	Herbert J. Dahlke 9/ 7/44 to 12/20/45	
Herbert J. Dahlke 12/20/45 to 6/16/49	H. J. Detloff 12/20/45 to 6/16/49	
Lamar Tooze 6/16/49 to 12/11/49	Mrs. Ralph W. Rasmussen 6/16/49 to date	

b. Columbia Villa.

The first project undertaken by HAP was the construction of Columbia Villa, a 400-dwelling unit housing project located in Portland and designed to provide low rent housing to Portland residents. The work on the project began in May, 1942. The completion date was June 15, 1943. To finance the construction of Columbia Villa, HAP, on July 10, 1942, borrowed from the United States, acting through the United States Housing Authority, $1,-292,000. The loan bore interest at 3 per cent per annum. Since HAP could obtain funds at a lower interest rate from private sources, an arrangement was made whereby HAP borrowed to the extent of its requirements from banks and trust companies and the United States in effect guaranteed the repayment of the loan. On August 3, 1942, HAP, under this arrangement, borrowed $1,730,000. The United States at the same time agreed that should the occasion arise it would loan an equal amount to HAP and thus put HAP in funds to pay the private

lenders. Upon completion of its loan from private sources, HAP repaid the loan it had obtained from the United States. From time to time, HAP has refinanced its Columbia Villa loan with private lenders and it has from time to time applied net income from the operation of the property to reduce the indebtedness. During May and June, 1948, the amount of the debt was $1,381,000, and it was owing to the Bessemer Trust Company of New York. The United States has at all times continued the "guarantee" arrangement with HAP, but it has never been called upon to perform its "guarantee" obligations.

The United States, under its Columbia Villa contract with HAP, is obligated to make certain annual contributions (not to exceed in any year 3½% of the cost of constructing the project) to pay any deficiency resulting from the operation of the project as a low rent housing and slum clearance project. These contributions are to be made only as required and only as long as the original indebtedness for the construction of the project remains unpaid. During the period from the construction of Columbia Villa to January 1, 1950, the total amount thus contributed from the United States to HAP was $51,-820.31. This amount was contributed during 1948 and 1949. Prior to 1948 Columbia Villa operated to produce income in excess of expenses.

HAP has agreed with the United States that the dwelling units at Columbia Villa will be rented only to families of low income, that is, to families

who are in the lowest income group and whose income is not sufficient to enable them to live in decent and sanitary private housing. From time to time, HAP, with the approval of the Federal Public Housing Authority, defines in dollars the income group which is entitled to apply for Columbia Villa Housing.

Columbia Villa is owned by HAP and the United States has no interest in the property. As soon as the indebtedness incurred in connection with the construction of the project is paid, all obligations of HAP to the United States in connection with Columbia Villa will terminate and HAP will be entirely free to manage or dispose of the property as it sees fit. In the meantime, HAP maintains and operates the project and selects the tenants for the project within the family income limits agreed upon with the United States. Since the United States is obligated to make annual contributions to the project in the event that operating expenses exceed rental income the annual HAP budget for the project is submitted to and approved by the Federal Public Housing Authority.

c. Other Housing Authority of Portland Projects.

Columbia Villa is owned by HAP. The other housing projects operated by the Authority are all owned by the United States. These federally owned projects were all constructed as war housing projects, and they are all located in Portland. These war housing projects, in addition to Vanport, are as follows:

Name	Approximate Number of Dwelling Units	Approximate Completion Date
Dekum Court	85	June, 1942
The Gartrell Group	725	October 10, 1942
The Guild's Lake Group	2,600	December 27, 1943
University Homes	2,000	November 28, 1942
St. Johns Woods	1,000	October 10, 1943
Parkside Homes	260	January 8, 1943
Slavin Court	75	September 27, 1943
Fulton Homes	324	October 30, 1943
Hudson Street Homes	118	March 1, 1943
Fir Court	72	March 1, 1943
Fairview Homes	265	September 7, 1943
Bellaira Court	110	September 22, 1943
Powers Dormitory	500	September 4, 1943
East Vanport	485	April, 1944
Fessenden Courts	152	January, 1944

With the exception of Dekum Court each of these projects is a temporary project.

With the exception of Vanport and Columbia Villa, each of the projects listed above was constructed under an arrangement whereby HAP made recomendations to the Federal Public Housing Authority, an agency of the United States, as to the necessity for housing in the area and as to available sites, available contractors and desirable types or construction. The construction was then undertaken by local contractors holding contracts with the United States, acting through the Federal Public Housing Authority (FPHA) or its predecessor agencies. Each project as it was completed was the subject of an agreement between the United States and HAP relating to the operation of the premises. Each of the projects was made subject to the so-called master lease of February 17, 1944.

The financial arrangement between the United States and HAP, with respect to Columbia Villa, has been described. The financial arrangement for HAP's other projects is set forth in the so-called master lease of February 17, 1944, as supplemented by the Administration Fund Agreement between the First National Bank of Portland, Oregon, and the Housing Authority of Portland, dated as of February 17, 1944. The arrangement between the parties contemplates that the United States will make, and from time to time the United States has made, advances to HAP to provide that Authority with funds for operating capital, to purchase coal, to purchase other stores, and to make payments in lieu of taxes. Payments in lieu of taxes are made by HAP to state and local governmental agencies in an amount approximately equal to what the taxes on the property would be if it were owned by private persons and not by the United States. The amount, date and purpose of the advances and the repayments of them are as follows:

Housing Authority of Portland, Oregon
Summary of PHA Advances and Repayments
4/1/43 to 1/31/50

Cash Advances					Repayments	
Date	Working Capital	Coal Purchases	Stores Inventory	P.I.L.O.T.	Date	Amount
4/ 1/43	$ 38,994.50				12/31/45	$ 38,994.50
	48,570.00					48,570.00
4/13/43	8,500.00					8,500.00
5/30/43	118,274.50					118,274.50
7/31/43	232,325.00					232,325.00
1/31/45			$ 60,000.00		8/31/45	20,000.00
1/31/45				88,414.00	4/30/45	88,414.00
1/31/45				88,414.00	1/31/46	88,414.00
4/30/45		$361,369.00			10/31/45	361,369.00
9/30/45		99,000.00			4/30/46	99,000.00
9/30/45		229,300.00			8/31/46	229,300.00
11/30/46	225,000.00				1/31/47	100,000.00
11/30/46				87,500.00	4/30/47	87,500.00
11/30/46				87,500.00	6/30/47	87,500.00
6/30/47			85,000.00			
11/30/47				345,750.00	4/30/48	345,750.00

11/30/47				191,500.00		
11/30/47				154,250.00		
Total	$671,664.00	$689,669.00	$145,000.00	$1,043,328.00		$1,953,911.00
Less Repaid	$546,664.00	$689,669.00	$ 20,000.00	$ 697,578.00		$1,953,911.00
Balance 5/31/48	$125,000.00	-0-	$125,000.00	$ 345,750.00		-0-
Balance Above	$125,000.00	-0-	$125,000.00	$ 345,750.00	10/31/48	$ 345,750.00
10/ 1/48	174,000.00				11/30/49	174,000.00
10/ 1/48				249,000.00	6/30/49	249,000.00
11/30/48				207,000.00		
Total	$299,000.00	-0-	$125,000.00	$ 801,750.00		$ 768,750.00
Less Repaid	174,000.00			594,750.00		768,750.00
Balance 1/31/50	$125,000.00	-0-	$125,000.00	$ 207,000.00		-0-
Grand Total						
Advances	$845,664.00	$689,669.00	$145,000.00	$1,499,328.00		$2,722,661.00
Less Repaid	$720,664.00	$689.669.00	$ 20,000.00	$1,292,328.00		$2,722,661.00
Balance 1/31/50	$125,000.00	-0-	$125,000.00	$ 207,000.00		-0-

The accounting between HAP and the United States in connection with these advances is separate and distinct from the accounting between the parties as to profits or losses from the lease operations. The advances are in the nature of loans for specific purposes and HAP has a general obligation to repay them. They are not evidenced by notes or other securities and they do not bear interest.

The financial arrangement betwen HAP and the United States under the so-called master lease contemplates that there will be an accounting between the parties as to profit or loss from the operation of the premises. Each year HAP prepares and submits to FPHA for its approval a detailed budget of all anticipated expense. If at the end of the year the income from the properties has not totalled the amount of operating expense which has received budget approval, the United States pays the deficiency. If, however, the income from the properties has exceeded the amount of approved operating expense, the excess is paid to the United States. Thus, any net income from the operation of the properties accrues to the United States and any authorized loss is borne by the United States. The result of operations under the so-called master lease are set forth below. The actual accounting between the parties is on an over-all basis rather than by separate projects. The reference, "Prior year adjustment additional," refers to budget and accounting adjustments which were authorized and approved by FPHA subsequent to the close of the fiscal period. The figures in parentheses represent deficits.

Housing Authority of Portland, Oregon
Statement of Operation of Leased Projects Only

	Total P.H.A. Leased		
	Income	Expense	Net
Beginning to 6/30/43	$1,993,642.81	$1,849,082.54	$ 144,560.27
7/ 1/43 to 6/30/44	7,185,405.68	5,476,537.83	1,708,867.75
7/ 1/44 to 6/30/45	7,622,357.34	5,301,880.80	2,320,477.14
7/ 1/45 to 6/30/46	5,707,954.65	4,959,834.52	748,120.13
Prior Yr. Adj., additional			44,044.44
7/ 1/46 to 6/30/47	5,416,096.39	4,936,696.12	479,400.27
Prior Yr. Adj., additional			(22,350.33)
7/ 1/47 to 6/30/48	5,064,818.37	5,177,266.07	(112,447.70)
Prior Yr. Adj., additional			(11,509.78)

As a further expression of the management policy to be adopted in connection with the projects subject to the so-called master lease, HAP adopted Master Management Resolution No. 154. This resolution and its amendments, Resolutions Nos. 204, 216, 279, 286, 339, 391, 412, and 458 (all of which relate to changes in rent schedules) were in effect during May and June, 1948.

Beginning early in 1942, FPHA created and it has since maintained a Manual of Policy and Procedure. Prior to February 24, 1942, when FPHA

was created by Executive Order 9070, United States Housing Authority, a federal corporation, created by Congress, was concerned with low-rent housing and it issued from time to time so-called policy bulletins which described the policy of the agency. The FPHA Manual was, in effect, a continuation of these earlier policy bulletins.

The FPHA Manual is designed (a) to express FPHA policy and requirements on subjects which, under the so-called master lease, are for FPHA decision or approval; (b) to express the views of FPHA on subjects which are for decision by the local housing authorities but which involve the fundamental policy of the housing program; and (c) to provide information which may be of use to the local authorities, such as information concerning new statutes or regulations, the activities of other governmental agencies, etc.

The FPHA Manual is prepared in loose-leaf fashion. From time to time and as changes are made in the applicable Federal statutes, or as new problems or new information comes to hand, FPHA distributes mimeographed releases to be inserted in the copies of the Manual maintained by local housing authorities and other interested persons. These releases are general in their terms in the sense that they are not directed to any particular person or any particular housing authority. Some of the releases relate to new subjects; other supplement or supersede existing releases.

The subjects covered by the releases are as follows: (a) budget and expense, including accounting; (b) care of and accountability for government property including property in a terminated or stand-by status and including the disposition of such property; (c) selection of tenants and rental arrangements; (d) rental rates; (e) community services; (f) commercial operations on the projects; and (g) reports. The releases are sometimes phrased in mandatory language; sometimes they are phrased in advisory or informative language.

The FPHA Manual relates to all housing operations in which FPHA has an interest, including both low rent and war housing. As of any given date, therefore, all the releases in the Manual are not applicable to any particular project. Those which are applicable to a given project can be identified by the content of the releases. During May and June, 1948, there were approximately 125 releases or sections in the Manual relating to the management of war housing projects such as Vanport.

In addition to the Manual, FPHA from time to time has issued a number of advisory bulletins. These bulletins are intended to make available to all the local housing authorities information concerning efficient and economical methods of project operation developed by individual local authorities. With three or four exceptions all such bulletins issued by FPHA have related to construction work rather than to management.

The releases appearing in the FPHA Manual were not published in the Federal register.

d. The employees of the Housing Authority of Portland.

The day to day operations of HAP are in the control of its commissioners and officers. Neither the United States nor any federal agency or employee has participated in any way in the selection of the commissioners for or the officers of HAP. The employees of Housing Authority of Portland are employed by the executive director of the Authority with the approval, in the case of key employees, of the HAP commissioners. The executive director on four or five occasions has discussed persons proposed for employment by HAP with field representatives of FPHA. In each case the proposed employee was selected in the first instance by the HAP executive director and in each instance the decision on employment was made by him. Neither FPHA nor any other agency or employee of the United States has undertaken to suggest to HAP the names of persons whom it should employ. Except as noted above, neither the United States nor any agency or employee of the United States has participated in any way in the selection of the employees of HAP. All employees of HAP receive their instructions from representatives of that organization and not from representatives of the United States. From time to time, however, personnel of HAP personally or by mail have discussed HAP problems with FPHA employees.

The administrative organization of HAP is as follows. The ultimate responsibility for the management of the authority lies with commissioners appointed by the Mayor of Portland. The chief executive officer of the authority is the executive director. All employees of the authority report directly or indirectly to the executive director who in turn reports to commissioners. The principal departments of HAP are the Accounting and Audits Department and the Department for the Management of Projects. During the period of construction of the projects operated by HAP, that organization also had a large Development Department. The Development Department was discontinued in September, 1944. The Accounting and Audits Department has charge of accounts, audits, payrolls and bonds. The Department for the Management of Projects has to do (a) with management functions such as tenant selection, project services, fire and safety, commercial leases, property and procurement and (b) with maintenance, including mechanical, electrical, heating, ventilating and plumbing maintenance for structures, grounds, stores, sanitation and transportation. During May and June, 1948, the personnel complement of the Accounting and Audits Department was approximately twenty-one persons. The Department for the Management of Projects employed approximately 214 persons other than skilled craftsmen and in addition approximately 440 persons in skilled crafts and holding union status. HAP employs a Portland lawyer on a contract

basis. No commissioner, officer or employee of HAP is an officer or employee of the United States or any federal agency, unless HAP is itself a federal agency. During May and June, 1948, there were 675 persons employed by HAP. Of these, 300 were employed at Vanport: 60 as firemen, 15 in accounting work, 5 in project services and the remainder in maintenance work.

The terms and conditions of employment for all employees of HAP are determined by its commissioners. This includes salaries, vacation periods, working hours, rates of pay, etc. The application forms provided to prospective employees of HAP make no mention of the United States or of any federal agency. The checks with which these employees are paid are not Treasury checks and they make no mention of the United States or of any federal agency. The employees of HAP normally receive their pay from funds obtained by HAP from rental payments by its tenants and this was the source of their pay in May, 1948. The employees of HAP take no oath of loyalty to the United States. They do not have civil service status under the rules and regulations of the United States Civil Service Commission. They do not participate in the Federal Employees Retirement Plan. Their rates of pay are not affected by general pay increases authorized by Congress for federal employees. The employees of HAP can be and are discharged by the executive director of the authority. They are the beneficiaries of a workmen's compensation arrangement estab-

lished under Oregon state law. The employees of HAP concerned with maintenance are union members and HAP has a contract with their union. When HAP needs additional help, a HAP representative so advises a union representative and the union selects a man for the employment. The firemen of Vanport were also union members and HAP had a contract with their union. The firemen were selected, however, by HAP and not by the union. Most of the employees of HAP and particularly those connected with the Accounts and Auditing Department and the Maintenance Department work on matters relating to all HAP projects.

e. Selection of tenants.

Since Vanport and East Vanport were erected for the specific purpose of providing housing for persons engaged in war industries, it was agreed between FPHA and HAP that the tenants should be selected entirely from among such persons. In this connection FPHA from time to time and on the advice of the War Manpower Commission and the Army and Navy Departments made available to HAP a list of industries located in the Portland area which were considered to be national defense or war industries. After the termination of active war hostilities the Vanport housing was made available for general housing purposes in the Portland area and during May and June, 1948, the residents of Vanport were engaged in ordinary civilian occupations.

The selection of the individual tenants at Vanport and East Vanport was made by HAP in accordance with the requirements of the Manual of Policy and procedure. Neither the United States nor any federal agency or employee participated in the selection or identification of the tenants who came within the classifications set forth in the Manual. HAP defined, and from time to time redefined with the approval of FPHA, the rents which were to be charged for the occupancy of the Vanport and East Vanport premises. The tenants occupied their dwelling units pursuant to revocable use permit in a form prepared by a lawyer for HAP and approved by FPHA. This revocable use permit named HAP as landlord and made no reference to the United States or to any federal agency. It did, however, conclude with the following language: "No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this permit or to any benefit to arise thereupon."

18. River Stage Forecasts for May and June, 1948.

The United States Weather Bureau began predicting river stages at Portland on May 1, 1948. With a few exceptions a forecast was made each day as to river stage for each of the succeeding four days. The forecasts thus made by the Weather Bureau between May 10, 1948, and June 10, 1948, adjusted to mean sea level, are tabulated below. The actual river stage on the days indicated appear in parentheses. The flood stages were measured at and forecast for the Vancouver, Washington, gauge

rather than Vanport. However, water levels at Vanport and water levels at Vancouver, Washington, gauge are normally the same.

These forecasts were provided by the United States Weather Bureau to the Corps of Engineers. They appeared day by day in the daily newspapers published in Portland and they were announced over the radio. They were also available at the Weather Bureau office in Portland to anyone who cared to inquire.

Actual and Forecasted Stages of Columbia River at Vancouver (Weather Bureau Guage)
As Converted to Mean Sea Level (1929 Adjustment)

Date of Forcast (actual)	Forecast for (actual)	Forecast for (actual)	Forecast for (actual)	Forecast for (actual)
May 10 (15.24)	May 11 15.84 (15.84)	May 12 16.54 (16.54)	May 13 17.04 (16.54)	May 14 17.54 (16.44)
11 (15.84)	12 16.54 (16.54)	13 17.04 (16.54)	14 17.34 (16.44)	15 17.54 (16.24)
12 (16.54)	13 16.84 (16.54)	14 16.54 (16.44)	15 16.24 (16.24)	16 16.24 (16.64)
13 (16.54)	14 16.24 (16.44)	15 16.04 (16.24)	16 15.74 (16.64)	17 16.74 (17.04)
14 (16.44)	15 16.24 (16.24)	16 16.24 (16.64)	17 17.24 (17.04)	18 17.44 (17.04)
15 (16.24)	16 16.24 (16.64)	17 17.24 (17.04)	18 17.44 (17.04)	19 17.44 (17.34)
16 (16.64)	17 17.24 (17.04)	18 17.24 (17.04)	19 17.44 (17.34)	20 17.64 (17.94)
17 (17.04)	18 17.24 (17.04)	19 17.24 (17.34)	20 17.44 (17.94)	21 17.74 (18.94)
18 (17.04)	19 17.24 (17.34)	20 17.54 (17.94)	21 18.04 (18.94)	22 18.24 (20.44)
19 (17.34)	20 17.74 (17.94)	21 18.44 (18.94)	22 18.84 (20.44)	23 19.14 (21.84)
20 (17.94)	21 18.64 (18.94)	22 19.34 (20.44)	23 20.04 (21.84)	24 20.44 (23.34)
21 (18.94)	22 19.64 (20.44)	23 20.94 (21.84)	24 21.74 (23.34)	25 22.44 (24.94)
22 (20.44)	23 21.84 (21.84)	24 22.64 (23.34)	25 23.54 (24.94)	26 24.04 (25.64)
23 (21.84)	24 22.94 (23.34)	25 23.94 (24.94)	26 25.54 (25.64)	27 26.24 (26.54)

May	24	(25.54)	May	25	24.84	(24.94)	May	26	25.34	(25.64)	May	27	25.04	(26.54)
	25	(24.94)		26	25.54	(25.64)		27	25.34	(26.54)		28	25.34	(27.64)
	26	(25.64)		27	25.74	(26.54)		28	26.34	(27.64)		29	27.04	(28.94)
	27	(26.54)		28	27.74	(27.64)		29	28.74	(28.94)		30	29.94	(30.64)
	28	(27.64)		29	29.04	(28.94)		30	30.24	(30.64)		31	31.44	(31.54)
	29	(28.94)		30	30.24	(30.64)		31	31.64	(31.54)	June	1	32.24	(32.24)
	30	(30.64)		31	32.14	(31.54)	June	1	33.34	(32.24)		2	33.34	(32.14)
	31	(31.54)	June	1	33.24	(32.24)		2	31.04	(32.14)		3	31.24	(31.94)
June	1	(32.24)		2	32.24	(32.14)		3	31.24	(31.94)		4	30.74	(31.84)
	2	(32.14)		3	31.54	(31.94)		4	31.14	(31.84)		5	30.94	(31.94)
	3	(31.94)		4	31.44	(31.84)		5	31.14	(31.94)		6	31.44	(32.24)
	4	(31.84)		5	31.64	(31.94)		6	31.74	(32.24)		7	32.54	(32.14)
	5	(31.94)		6	32.24	(32.24)		7	32.24	(32.14)		8	31.94	(32.14)
	6	(32.24)		7	32.24	(32.14)		8	32.04	(32.14)		9	31.84	(32.14)
	7	(32.14)		8	31.94	(32.14)		9	31.74	(32.14)		10	31.94	(32.24)
	8	(32.14)		9	32.04	(32.14)		10	32.14	(32.24)		11	32.24	(32.34)
	9	(32.14)		10	32.14	(32.24)		11	32.24	(32.34)		12	32.34	(32.14)
	10	(32.24)		11	32.34	(32.34)		12	32.44	(32.14)		13	32.34	(32.44)

May	28	24.64	(27.64)		
	29	25.54	(28.94)		
	30	27.84	(30.64)		
	31	30.94	(31.54)		
June	1	32.24	(32.24)		
	2	32.74	(32.14)		
	3	32.94	(31.94)		
	4	30.74	(31.84)		
	5	30.24	(31.94)		
	6	31.24	(32.24)		
	7	31.74	(32.14)		
	8	33.04	(32.14)		
	9	31.74	(32.14)		
	10	31.74	(32.24)		
	11	31.94	(32.34)		
	12	32.34	(32.14)		
	13	32.34	(32.44)		
	14	32.34	(32.44)		

10. The Failure.

During the latter part of May, 1948, the Columbia River and its tributaries were in flood. More than fifty cities and towns, together with suburban and agricultural areas, were affected to a greater or lesser degree by the high water. The flood fight involved 475 miles of levees protecting approximately 200,000 acres of land. On the lower Columbia alone, 61 drainage and diking districts were affected. During the high water period more than 10,000 persons participated in the flood fight and before the flood was over more than 400,000 acres had been inundated, 41 persons had lost their lives and property damage estimated at $100,000,000 had resulted.

The 1948 flood of the Columbia River was the second highest of record on the river. On June 1 and June 14, 1948, the flood waters reached an elevation of 31.1 feet m.s.l. on the Portland guage. On June 7, 1894, the recorded elevation was 34.2 feet. The next highest flood water elevations were those of June 24, 1876: 29.4 feet; July 1, 1880: 28.5 feet; and June 14, 1882: 27.3 feet.

On May 30, 1948, the water elevation at Peninsula Drainage Districts Nos. 1 and 2 was 30.8 feet m.s.l. The western embankment of Peninsula Drainage District No. 1 failed between 4:00 and 4:30 p.m. on May 30, 1948. The north end of the break was at a point 2,605 feet from the south end of the Spokane, Portland & Seattle Railway Company bridge across Oregon Slough. The south end of the break was at a point 2,850 feet north of the north

end of the railroad bridge across Columbia Slough. The width of the break was 590 feet.

The water as it entered Peninsula Drainage District No. 1 first filled the sloughs and drainage system of the area. It then advanced eastward, spreading across the entire district approximately at the rate at which a person walks. Witnesses to the flooding of the district estimate that the time required to fill the area was between 45 and 70 minutes. Upon the flooding of Peninsula Drainage District No. 1, the Governor of Oregon immediately declared a state of limited emergency. The next morning, on May 31, 1948, the Governor ordered the Oregon National Guard to evacuate, forcibly if necessary, all persons living in Peninsula Drainage District No. 2. The evacuation took place as ordered.

Upon the failure of the western embankment of Peninsula Drainage District No. 1, the flood waters advanced across the district to Denver Avenue and the fill which supports it. A flood fight was conducted along Denver Avenue but between 9:00 and 10:00 p.m., on May 31, 1948, the ring levee at the Denver Avenue underpass failed, permitting the flood waters to encroach upon and eventually fill the area between Denver Avenue and Union Avenue. Between 12:00 p.m., and 1:00 a.m., of the night of May 31-June 1, 1948, the fill supporting Union Avenue failed at the site of the southern culvert beneath the fill. At about the same time the Union Avenue fill also failed at the location of the junction between Union and Denver Avenues. Upon the fail-

ure of the Union Avenue fill the flood waters continued across Peninsula Drainage District No. 2 and eventually filled the entire district. Upon the failure of the western embankment at Peninsula Drainage District No. 1, that district and Peninsula Drainage District No. 2 were placed in charge of the Oregon National Guard, the Oregon State Police and the Sheriff of Multnomah County. This arrangement continued until June 5, 1948, when the Multnomah County Sheriff assumed full responsibility for the area.

Prior to May 30, 1948, no water other than seepage water had entered either Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2. The only levees or embankments which failed in either district were the western embankment of Peninsula Drainage District No. 1, the ring levee surrounding the Denver Avenue underpass and the fill supporting Union Avenue.

20. Plaintiffs and Their Properties.

During May and June, 1948, each of the plaintiffs in these consolidated cases owned property located in Peninsula Drainage District No. 2. The property of some of the plaintiffs was located between Denver Avenue and Union Avenue. The property of other plaintiffs was located east of Union Avenue. Some of the plaintiffs acquired and improved their properties prior to the construction of the Denver Avenue underpass and the ring levee; other plaintiffs acquired their properties prior to that time but improved them thereafter; still other plaintiffs both

acquired and improved their properties subsequent to the construction of the Denver Avenue underpass and the ring levee. During the period of approximately thirty hours between the failure of the western embankment at Peninsula Drainage District No. 1 and the failure of the ring levee, plaintiffs had an opportunity to remove and they did remove much or all of their movable property located in Peninsula Drainage District No. 2.

D. It is further stipulated that duly qualified witnesses would, if called, testify on behalf of the defendant, and that for purposes of these consolidated cases it shall be deemed that such witnesses have so testified, that no one of the plaintiffs ever advised the United States or any agency or employee of the United States that it was his opinion or position (a) that the primary levees surrounding Peninsula Drainage Districts Nos. 1 and 2 were inadequate or in danger of failure or (b) that the construction of the Denver Avenue underpass was in violation of his rights, or (c) that on account of the Denver Avenue underpass the United States had an affirmative duty to provide him with flood protection, or (d) that the ring levee was improperly constructed or negligently maintained, or (e) that any plaintiff communicated with the United States or any employee of the United States in any way whatever in connection with the Denver Avenue underpass or the ring levee. It is further stipulated that the parties or any of them shall be free upon the trial of this action to introduce

further testimony in contradiction to or in support of the testimony to which this Paragraph D refers.

E. It is further stipulated that the answers of the United States now on file in these consolidated cases shall be deemed to be amended to include in each such answer as a separate defense an allegation that the claim of the plaintiff is barred by the statute of limitations.

F. Each of the plaintiffs in each of these consolidated cases contends and the United States denies:

Contentions of Plaintiffs

1. That the Federal Public Housing Authority, at all times mentioned in the complaint, was a governmental agency.

2. That in the matters complained of in the complaint, the Federal Housing Authority acted deliberately and negligently and not as a matter of discretion.

3. That the Court has full and complete jurisdiction over this action by virtue of the Federal Tort Claims Act.

4. That at all times since the creation of Drainage District No. 2, on or about January 18, 1918, Denver Avenue Fill (formerly known as Derby Street Fill) constituted a common boundary between Peninsula Drainage District No. 1 on the West and Peninsula Drainage District No. 2 on the East.

5. The said Denver Avenue Fill constituted an element of security to both Districts Nos. 1 and 2, additional to the levees or dikes around the outer boundary of both districts.

6. That the said Denver Avenue Fill had an elevation of 35 feet at all times subsequent to January, 1942, and in addition to its use as a levee, was also used as a highway, being known as Denver Avenue and/or United States Highway 99.

7. That the Federal Public Housing Authority and/or Maritime Commission owned property on both sides of Denver Avenue, the west portion being occupied by the Vanport Housing Project.

8. That at a point about half way between the north and south boundaries of the Vanport Tract, the Federal Public Housing Authority, acting in its official capacity, and as an agent or instrumentality of the United States of America, cut through Denver Avenue by causing to be excavated an underpass connecting its property east of Denver Avenue with the Vanport Tract.

9. The negligent severance and excavation by the Federal Public Housing Authority of Denver Avenue Fill constituted a continuing negligent act during all times subsequent to August, 1942, up to May 31, 1948.

10. That the plaintiff and other persons similarly situated in Drainage District No. 2 relied on the protection and security against floods and flood water, afforded by the Denver Avenue Fill.

11. That after the severance of Denver Avenue Fill, in the fall of 1942, the Federal Public Housing Authority attempted to erect a substitute barricade against flood or flood waters in Drainage District No. 2, by the construction of a semi-circular ring levee attaching to the east slope of the Denver Avenue levee at points immediately North and South of the severance.

12. That the ring levee so constructed by Federal Public Housing Authority was entirely inadequate for the purpose intended, namely, protection against flood and flood waters, by reason of its composition, width, and height.

13. The fact that the ring levee was inadequate and unsuitable for the purpose intended was known to the Federal Public Housing Authority and the Corps of Engineers, U.S.A.

14. That said inadequate and unsuitable ring levee was not only not improved nor repaired to a point where it was adequate, as the Federal Public Housing Authority should have done, but said agency improperly and improvidently maintained such ring levee allowing it to fall into a state of poor condition and repair.

15. That at no time between November, 1942, and June, 1948, did the Federal Public Housing Authority construct or maintain an adequate levee to replace the security destroyed when it cut Denver Avenue. That the Federal Public Housing Authority used and permitted the use by the public gen-

erally, and particularly tenants in the Vanport Housing Project of the underpass through Denver Avenue Fill, between November, 1942, and June, 1948, during which time the underpass constituted a gaping hole or aperture through Denver Avenue Fill, 138 feet wide at the top of the fill, and approximately 76 feet wide at the bottom of the cut.

16. That the maintenance of the ring levee and the failure to properly maintain, improve, and/or repair the said ring levee by the Federal Public Housing Authority constituted a continuing offense and nuisance at all times between November, 1942, to June, 1948.

17. That Denver Avenue Fill in its entire length north from Columbia slough to the Columbia River constituted an adequate and sufficient levee and barrier against flood waters, reasonably to be expected from the Columbia River, except where Denver Avenue Fill was severed by the underpass.

18. Conceding that Denver Avenue Fill was severed for the underpass, it was still reasonably possible to protect properties lying in Drainage District No. 2 from flood or flood waters encroaching from the West by the construction of an adequate ring levee around the severance. Having severed Denver Avenue, it was the duty of Federal Public Housing Authority to construct an adequate ring levee.

19. That tortious and negligent acts complained

of by the plaintiff were not acts of God, as contended by the defendant.

20. The plaintiff and others similarly situated did not assume, condone nor acquiesce in the tortious and negligent acts of the defendant complained of in the complaint.

21. Section 702 c, Title 33, U.S.C.A., does not apply to the present proceedings. The language of this section must be read in its entirety and in connection with the other provisions of the act of which it is a part, and not read piecemeal.

22. That neither the severance of Denver Avenue Fill nor the construction of the underpass in 1942 were the wrongful acts of the Oregon State Highway Commission, as contended by the defendant. There was nothing the plaintiff, nor others similarly situated, could do as a private citizen to prevent the severance of Denver Avenue Fill by the Federal Public Housing Authority. Permission of the plaintiff and others similarly situated to make the severance, construct the viaduct, and erect the ring levee, was not requested by the Federal Public Housing Authority nor any other agency connected with the defendant. Such acts were done without the knowledge or consent of the plaintiff.

23. Upon learning the intention of the Federal Public Housing Authority to sever Denver Avenue Fill, creating an underpass, and constructing a viaduct and ring levee, Drainage District No. 2 officially objected in writing to the Corps of Engineers,

Department of the Army. The legal obligation of Drainage District No. 2 to maintain its levees was effectively nullified by the tortious and negligent act of the defendant, and Drainage District No. 2 was not thereby rendered responsible.

24. Denver Avenue Fill has been regarded at all times as a dike or levee jointly used by Drainage District No. 1 and Drainage District No. 2, to protect the East and West boundaries, respectively, of said districts.

25. There was nothing in the appearance of the ring levee as it was finally constructed to put the average person observing it upon notice that it was inadequate as a substitute protection for that removed by the construction of the Vanport underpass.

26. The construction by the Housing Authority of Portland of a drain pipe through Denver Fill at the underpass constituted an additional hazard to properties lying in Drainage District No. 2 as it was designed with flood gates which readily permitted waters to run from west to east of Denver Fill, but not from east to west.

27. An additional hazard to properties lying in Drainage District No. 2 was created when a clay blanket of top soil was placed on the east side of the ring levee, whereas no similar clay blanket was placed on the west slope of the ring levee. The east slope of the ring levee was on a ratio of 1½ to 1,

which was too steep for adequate protection against flood waters encroaching from the west.

28. The Housing Authority of Portland is a Federal Agency within the purview of the Federal Tort Claims Law.

29. The Housing Authority of Portland in operating Vanport and maintaining its various facilities including the underpass and ring levee was acting as an operating agency for the Federal Public Housing Authority and the United States of America.

30. The traffic interchange at Union and Denver Avenues was so designed and constructed that the serviceability and function of Denver Fill was not impaired.

31. The public generally and this plaintiff in particular regarded Denver Avenue and fill and the ring levee at the Vanport Underpass as a levee suitable and adequate for protection against flood waters from the west.

32. That the County of Multnomah in accepting a deed from Peninsula Industrial Company under the terms and conditions of such deed had the duty to construct and maintain a fill on said Denver Avenue, the western boundary of Peninsula District No. 2.

33. That under the terms of said deed, 237.06′ of the fill was placed on private property of which the said Multnomah County had no control except an agreement to maintain the same. Assuming that

the 80′ highway deeded to the County was in the center of this fill, this would leave 118.8′ of the fill on the eastern side belonging privately to the adjoining owners and 118.8′ on the western side belonging to private owners.

34. That by the terms of said deed to Multnomah County, the grantor in said deed together with its successors in title including the plaintiffs and Peninsula District No. 2 had the right to construct levees, dikes and embankments connecting with the same and to use the fill on Denver Avenue as a levee or dike.

35. That Peninsula District No. 2 and the property owners therein did make use of said fill as a dike or levee and constructed under the terms of said deed levees, fills and embankments connecting therewith on the north and south thereby completing Peninsula District No. 2 with full dike and levee protection from all sides.

36. That when F.P.H.A. cut the underpass through said Denver Avenue Fill they cut through not only the highway, but through private property of 118.8′ on the eastern side thereof and 118.8′ on the western side thereof and that in cutting such underpass, they received no permission whatsoever from any land owners or from Peninsula District No. 2, gave them no notice of such intention to cut such underpass and did cut the same over the objection of Peninsula District No. 2.

37. That after severing said Denver Avenue

with said underpass, leaving it possible for flood waters or other waters coming from the west to overflow on the Peninsula District No. 2, said F.P.H.A. owed a duty to Peninsula District No. 2 and to all the property owners therein, including the plaintiffs, to construct and maintain a levee or dike surrounding such underpass of equal protection as the Denver Avenue Fill, that is the fill so severed.

38. That F.P.H.A. has been negligent in failing to either construct a dike or levee of equal protection with said Denver Avenue Fill and in failing to properly maintain such protection.

39. That there was no consideration paid for the deed from Peninsula Industrial Company except the agreement on the part of Multnomah County to cut a fill and maintain the same. That the purpose on the part of Peninsula Industrial Company was to provide in this manner for a dike or levee to assist in reclaiming the overflowed ground on either side of the highway belonging to them and now including Peninsula District No. 2.

40. That in taking over the highway from Multnomah County, the State Highway Commission got no more rights than Multnomah County had under the terms of said deed and became subject to the same obligations.

G. With respect to each of the plaintiffs and each of the consolidated cases, the United States contends and the plaintiffs deny:

Contentions of the United States

1. That this Court has no jurisdiction of this action either under the Tort Claims Act or otherwise.

2. That the matters of which plaintiff complains took place prior to the enactment of the Tort Claims Act and therefore that such matters are not actionable under that statute or at all.

3. That the Tort Claims Act confers no jurisdiction on this Court and this Court has no jurisdiction to hear claims, such as those asserted by plaintiff, based upon an alleged breach by the United States of its alleged duties as an owner of property.

4. That the Tort Claims Act confers no jurisdiction on this Court and this Court has no jurisdiction to hear claims, such as those asserted by plaintiff, based upon an alleged failure of the United States, its agencies or employees, to expend public moneys in the construction or maintenance of flood control structures for the benefit of plaintiff.

5. That the matters complained of in the complaint involve the exercise or performance or the failure to exercise or perform a discretionary function or duty as to which there can be no liability under the Tort Claims Act.

6. That the liability, if any, of the United States under the Tort Claims Act arises only on the conditions there stated and only for specific acts of

negligence or wrongful conduct by a specific and identified employee of the United States acting within the scope of his employment.

7. That no employee of the United States was negligent or engaged in any wrongful conduct within the scope of his employment in connection with the matters complained of in the complaint and nothing done or not done by any employee of the United States was the proximate cause of any damage to plaintiff.

8. That all damage to plaintiff was caused by an Act of God for which neither the United States nor its agencies or employees was in any way responsible and for which the United States cannot be held liable.

9. That the United States has no police power; and that neither the United States nor its agencies or employees had any duty to protect plaintiff's property from flood damage.

10. That if any agency of government was responsible for the safety of plaintiff's property, the agencies of government so responsible were the State of Oregon, the County of Multnomah and Peninsula Drainage District No. 2.

11. That plaintiff was himself chiefly and finally responsible for the protection of his property from flood damage.

12. That Denver Avenue, the fill beneath it and the land upon which it rests are and ever since 1937

have been the property of the State of Oregon and controlled and maintained exclusively by the Oregon State Highway Department.

13. That the fill supporting Denver Avenue was not constructed as a levee or for flood control purposes; and that said fill is not and never has been a part of the Columbia River levee system.

14. That Denver Avenue and the fill supporting it were constructed and have ever since been maintained solely and exclusively for highway purposes.

15. That Denver Avenue and the fill supporting it are and for many years have been dedicated to the public for highway purposes; that by reason of said dedication the use of said fill for highway purposes is the paramount use thereof; that neither plaintiff nor any person has or could acquire any right whatever in connection with the Denver Avenue fill limiting or restricting its use for highway purposes.

16. That the underpass beneath Denver Avenue was constructed for a legitimate highway purpose and to meet a legitimate traffic demand; and that the construction of the underpass for highway purposes violated no right of plaintiff.

17. That the underpass beneath Denver Avenue was built by Kaiser Company, Inc., or its subcontractors with the consent of and in accordance with plans furnished by the State of Oregon, the owner of Denver Avenue, the fill supporting it and the land upon which it rests.

18. That in connection with the construction of the Denver Avenue underpass, the State of Oregon did not require the construction of a ring levee or the installation of any flood protection structure whatever.

19. That the construction of the underpass beneath Denver Avenue with the consent of the State of Oregon, the owner of Denver Avenue, the fill supporting it and the land upon which it rests, was not in violation of any obligation owing to plaintiff or any right belonging to plaintiff.

20. That neither the State of Oregon or Kaiser Company, Inc., or its subcontractors or the United States, its agencies or employees, had any obligation whatever by statute, by contract or by law to provide any flood protection whatever to plaintiff or to build or to maintain Denver Avenue and the fill supporting it for flood protection purposes.

21. That in connection with a levee system it is not customary to build or maintain secondary levees and such levees are not required by due care and good engineering practice.

22. That prior to the levee failures of May and June, 1948, there was no reason to anticipate that any of the primary levees surrounding Peninsula Drainage Districts Nos. 1 and 2 would fail and hence due care and good engineering practice did not require the construction or maintenance of secondary levees in the area.

23. That the law regards flood waters as a com-

mon enemy against which each person is entitled to protect himself as and to the extent he sees fit and with no obligation to protect any other person; that the ring levee adjacent to the Denver Avenue underpass was intended to protect the Vanport residents and the $25,000,000 investment of the United States in Vanport in the event that the primary levees of Peninsula Drainage District No. 2, which were lower than those of Peninsula Drainage District No. 1, were overtopped by flood waters; that plaintiff, although he had no rights in connection with the construction or maintenance of the ring levee, was greatly benefited by its existence.

24. That the United States, its agencies or employees, neither had or assumed any obligation to plaintiff to build or maintain the ring levee carefully or at all.

25. That the United States, its agencies or employees, neither had or assumed any obligation to plaintiff in connection with Denver Avenue, the ring levee or at all.

26. That the United States, its agencies or employees, neither had or assumed any obligation whatever to protect plaintiff or his property from flood damage; that nevertheless plaintiff was greatly benefited during the 1948 high water period by the temporary protection provided by the ring levee constructed adjacent to the Denver Avenue underpass.

27. That one land owner, such as the United States, has no duty to erect an embankment to protect another land owner, such as plaintiff, from flood damage; and that a land owner who erects an embankment for flood protection purposes has no duty to maintain that embankment carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect.

28. That Vanport and East Vanport, including the ring levee and the property upon which it was located, were leased by the United States to the Housing Authority of Portland by the so-called master lease dated February 17, 1944, effective January 1, 1944.

29. That from and after January 1, 1944, the United States, its agencies or employees, had no right of access to or responsibility for the ring levee.

30. That from and after January 1, 1944, the ring levee was maintained by the Housing Authority of Portland.

31. That the Housing Authority of Portland had no duty to plaintiff to maintain the ring levee with due care or at all.

32. That the Housing Authority of Portland is not a federal agency and its employees are not federal employees within the meaning of the Tort Claims Act; and that the United States is not responsible for the negligent or wrongful conduct, if

any, of the Housing Authority of Portland or its employees.

33. That at all times the ring levee was maintained with due care and in accordance with good engineering practice.

34. That prior to the 1948 flood plaintiff did not assert or contend or advise the United States or its agencies or employees that the construction of the Denver Avenue underpass would be or was a breach of any duty owing from the United States to him.

35. That prior to the 1948 flood plaintiff did not assert or contend that the United States or its agencies owed him a duty to build or maintain the ring levee carefully or at all.

36. That prior to the 1948 flood plaintiff did not assert or contend that the ring levee was constructed or maintained in an unsatisfactory or negligent fashion.

37. That prior to the 1948 flood plaintiff did not assert or contend that the ring levee was a nuisance.

38. That by failing at any time prior to the 1948 flood to assert or contend that the construction of the Denver Avenue underpass was a breach of any duty owing to him, by failing to assert or contend that the United States owed him any duty to build or maintain the ring levee carefully or at all and by failing to assert or contend that the ring levee was constructed or maintained in a negligent or wrongful fashion, plaintiff has waived his claim, if any,

against the United States and plaintiff is estopped from asserting any such claim.

39. That subsequent to the construction of the ring levee and prior to the 1948 flood, plaintiff acquired or improved his property and thereby assumed with respect to such property the risk, if any, arising from the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee.

40. That if the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee constituted, as plaintiff now contends, a flood hazard to plaintiff, plaintiff was negligent in failing to take steps to protect his property against that hazard and on account of that negligence plaintiff cannot recover in this action.

41. That no agency or employee of the United States was authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff; and nothing any employee of the United States did or did not do in that connection was within the scope of his employment.

42. That each of the claims of plaintiff is barred by the statute of limitations.

43. That each of the claims of plaintiff is barred by laches and acquiescence.

44. That each of the claims of plaintiff is barred by the provisions of 33 U.S.C.A. 702c.

45. That no act or failure to act of the United States, its agencies or employees, was the proximate cause of any damage to plaintiff.

46. That the United States, its agencies and employees, exercised due care in all matters referred to in the complaint.

47. That each of the contentions of plaintiff is contrary to fact and to law.

48. That each defense set forth in the answer of the United States is a valid defense to plaintiff's claim.

H. The following questions of fact or mixed questions of law and fact are to be determined with respect to each of the consolidated cases:

1. Was the Federal Public Housing Authority, at all times mentioned in the complaint, a governmental agency?

2. In the matters complained of in the complaint, did the Federal Public Housing Authority act deliberately and negligently and not as a matter of discretion?

3. Did the Denver Avenue fill (formerly known as Derby Street fill) constitute a common boundary between Peninsula Drainage District No. 1 on the west and Peninsula Drainage District No. 2 on the east at all times since the creation of Drainage District No. 2?

4. Did the Denver Avenue fill constitute an element of security to both Districts Nos. 1 and 2, addi-

tional to the levees or dikes around the outer boundary of both districts?

5. Did the Denver Avenue fill have an elevation of 35 feet at all times subsequent to January, 1942, and in addition to its use as a levee, was it also used as a highway, being known as Denver Avenue and/or United States Highway 99?

6. Did the Federal Public Housing Authority and/or the Maritime Commission own property on both sides of Denver Avenue and was the west portion occupied by the Vanport housing project?

7. Did the Federal Public Housing Authority, acting in its official capacity and as an agent or instrumentality of the United States, cut through Denver Avenue by causing to be excavated an underpass connecting its property east of Denver Avenue with the Vanport tract at a point about half way between the north and south boundaries of the Vanport tract?

8. Did the severance and excavation by the Federal Public Housing Authority of the Denver Avenue fill constitute a continuing negligent act during all times subsequent to August, 1942, up to May, 1948?

9. Did the plaintiff and other persons similarly situated in Peninsula Drainage District No. 2 rely on the protection and security against floods and flood water afforded by the Denver Avenue fill?

10. Did the Federal Public Housing Authority

attempt to erect a substitute barricade against flood or flood waters in Peninsula Drainage District No. 2, by the construction of a semi-circular ring levee near the east slope of the Denver Avenue fill at points immediately north and south of the severance in the fill?

11. Was the ring levee entirely inadequate for the purpose intended, namely protection against flood and flood waters, by reason of its composition, width, and height?

12. If the ring levee was inadequate and unsuitable for the purpose intended, was that fact known to the Federal Public Housing Authority and the Corps of Engineers?

13. If the ring levee was inadequate and unsuitable, should the Federal Public Housing Authority have repaired the ring levee in a fashion to make it adequate and did said agency improperly and improvidently maintain the ring levee, allowing it to fall into a state of poor condition and repair?

14. Did the Federal Public Housing Authority at any time between November, 1942, and June, 1948, construct or maintain an adequate levee to replace the security destroyed by the underpass through Denver Avenue, a gaping hole or aperture 138 feet wide at the top of the fill and approximately 76 feet wide at the bottom of the cut?

15. Did the maintenance of the ring levee and the failure, if any, to properly maintain, improve, and/or repair the ring levee by the Federal Public

Housing Authority contitute a continuing offense and nuisance at all times between November, 1942, to June, 1948?

16. Did the Denver Avenue fill in its entire length constitute an adequate and sufficient levee and barrier against flood waters reasonably to be expected from the Columbia River except where the Denver Avenue fill was severed by the underpass?

17. Conceding that Denver Avenue Fill was severed for the underpass, was it still reasonably possible to protect properties lying in Peninsula Drainage District No. 2 from flood or flood waters encroaching from the west by the construction of an adequate ring levee around the severance?

18. Were the acts complained of by the plaintiff acts of God, as contended by the defendant?

19. Did the plaintiff and others similarly situated assume, condone or acquiesce in the acts of the defendant complained of in the complaint?

20. Was the severance of Denver Avenue fill or the construction of the underpass in, 1942 the acts of the Oregon State Highway Commission and was there anything the plaintiff, or others similarly situated, could do as a private citizen to prevent the severance of Denver Avenue fill? Was permission of the plaintiff and others similarly situated to make the severance, construct the underpass and erect the ring levee, requested by the Federal Public Housing Authority or any other agency connected with the defendant and were such acts done without the knowledge or consent of the plaintiff?

21. Did Peninsula Drainage District No. 2 officially object in writing to the Corps of Engineers upon learning of the intention to sever the Denver Avenue fill?

22. Has the Denver Avenue fill been regarded at all times as a dike or levee, jointly used by Peninsula Drainage Districts Nos. 1 and 2, to protect the east and west boundaries, respectively, of said districts?

23. Did the matters of which plaintiff complains take place prior to the enactment of the Tort Claims Act?

24. Do the matters complained of in the complaint involve the exercise or performance or the failure to exercise or perform a discretionary function or duty?

25. Was any employee of the United States negligent or engaged in any wrongful conduct within the scope of his employment in connection with the matters complained of in the complaint and was anything done or not done by any employee of the United States the proximate cause of any damage to plaintiff?

26. Was all damage to plaintiff caused by an Act of God?

27. Was plaintiff himself chiefly and finally responsible for the protection of his property against flood damage?

28. Is Denver Avenue, the fill beneath it and the land upon which it rests now, and ever since 1937 has it been, the property of the State of Oregon and controlled and maintained exclusively by the Oregon State Highway Department?

29. Was the fill supporting Denver Avenue constructed as a levee or for flood control purposes; and is said fill now, or has it ever been, a part of the Columbia River levee system?

30. Were Denver Avenue and the fill supporting it constructed and have they ever since been maintained solely and exclusively for highway purposes?

31. Are Denver Avenue and the fill supporting it and have they for many years been dedicated to the public for highway purposes and is the paramount use thereof the use for highway purposes?

32. Was the underpass beneath Denver Avenue constructed for a legitimate highway purpose and to meet a legitimate traffic demand?

33. Was the underpass beneath Denver Avenue built by Kaiser Company, Inc., or its subcontractors with the consent of and in accordance with plans furnished by the State of Oregon?

34. Did the State of Oregon require the construction of a ring levee or the installation of any flood protection structure whatever in connection with the construction of the Denver Avenue underpass?

35. It is customary to build or maintain second-

ary levees in connection with levee system and are such levees required by due care and good engineering practice?

36. Was there any reason to anticipate that any of the primary levees surrounding Peninsula Drainage Districts Nos. 1 and 2 would fail and did due care and good engineering practice require the construction or maintenance of secondary levees in the area?

37. Was the ring levee built adjacent to the Denver Avenue underpass intended to protect the Vanport residents and the $25,000,000 investment of the United States in Vanport in the event that the primary levees of Peninsula Drainage District No. 2, which were lower than those of Peninsula Drainage District No. 1, were overtopped by flood waters, and was the ring levee nevertheless greatly to the benefit of plaintiff?

38. Did the United States, its agencies or employees, assume any obligation to plaintiff to build or maintain the ring levee carefully or at all?

39. Did the United States, its agencies or employees, assume any obligation to plaintiff in connection with Denver Avenue, the ring levee or at all?

40. Did the United States, its agencies or employees, assume any obligation whatever to protect plaintiff or his property from flood damage and was plaintiff nevertheless greatly benefited during the 1948 high water period by the temporary protection

provided by the ring levee constructed adjacent to the Denver Avenue underpass?

41. Were Vanport and East Vanport, including the ring levee and the property upon which it was located, leased by the United States to the Housing Authority of Portland by the so-called master lease dated February 17, 1944, effective January 1, 1944?

42. Was the ring levee maintained by the Housing Authority of Portland from and after January 1, 1944?

43. Was the ring levee, at all times, maintained with due care and in accordance with good engineering practice?

44. Did plaintiff assert or contend or advise the United States, its agencies or employees, that the construction of the Denver Avenue underpass would be or was a breach of any duty owing from the United States to him?

45. Did plaintiff assert or contend or advise the United States that it owed him a duty to build or maintain the ring levee carefully or at all?

46. Did plaintiff assert or contend or advise the United States that the ring levee was constructed or maintained in an unsatisfactory or negligent fashion?

47. Did plaintiff assert or contend that the ring levee was a nuisance?

48. Did plaintiff acquire or improve his property subsequent to the construction of the ring levee and

prior to the 1948 flood and thereby assume with respect to such property the risk, if any, arising from the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee?

49. If the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee constituted, as plaintiff now contends, a flood hazard to plaintiff, was plaintiff negligent in failing to take steps to protect his property against that hazard?

50. Was any agency or employee of the United States authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff; and was anything any employee of the United States did or did not do in that connection within the scope of his employment?

51. Was any act or failure to act of the United States, its agencies or employees, the proximate cause of any damage to plaintiff?

52. Did the United States, its agencies and employees, exercise due care in all matters referred to in the complaint?

I. The following issues of law are to be determined with respect to each of the consolidated cases:

1. Does the Court have jurisdiction of this action by virtue of the Tort Claims Act?

2. Did the failure, if any, to properly maintain, improve, and/or repair the ring levee by the Federal Public Housing Authority constitute a continuing offense and nuisance at all times from November, 1942, to June, 1948?

3. Conceding that Denver Avenue Fill was severed for the underpass, was it the duty of Federal Public Housing Authority to construct an adequate ring levee?

4. Were the acts complained of by the plaintiff acts of God?

5. Did the plaintiff and others similarly situated assume, condone or acquiesce in the acts of the defendant complained of in the complaint?

6. Does Section 702c, Title 33, U.S.C.A., apply to the present proceedings?

7. Was the severance of the Denver Avenue fill a wrongful act of the Oregon State Highway Commission?

8. Was the obligation, if any, of Peninsula Drainage District No. 2 to maintain its levees effectively nullified by the acts of the defendant?

9. Has Denver Avenue Fill been regarded at all times as a dike or levee, jointly used by Peninsula Drainage Districts Nos. 1 and 2, to protect the east and west boundaries, respectively, of said districts?

10. Has this Court jurisdiction of this action either under the Tort Claims Act or otherwise?

11. Are matters which took place prior to the enactment of the Tort Claims Act actionable under that statute or at all?

12. Does the Tort Claims Act confer jurisdiction on this Court and does this Court have jurisdiction to hear claims based upon an alleged breach by the United States of its alleged duties as an owner of property?

13. Does the Tort Claims Act confer jurisdiction on this Court and does this Court have jurisdiction to hear claims based upon an alleged failure of the United States, its agencies or employees, to expend public moneys in the construction or maintenance of flood control structures for the benefit of plaintiff?

14. Do the matters complained of in the complaint involve the exercise or performance or the failure to exercise or perform a discretionary function or duty as to which there can be no liability under the Tort Claims Act?

15. Does the liability, if any, of the United States under the Tort Claims Act arise only on the conditions there stated and only for specific acts of negligence or wrongful conduct by a specific and identified employee of the United States acting within the scope of his employment?

16. Was any employee of the United States negligent or engaged in any wrongful conduct within the scope of his employment in connection with the matters complained of in the complaint and was

anything done or not done by any employee of the United States the proximate cause of any damage to plaintiff?

17. Was all damage to plaintiff caused by an Act of God for which neither the United States nor its agencies or employees were in any way responsible and for which the United States can not be held liable?

18. Has the United States police power and did the United States, its agencies or employees, have any duty to protect plaintiff's property from flood damage?

19. If any agency of government was responsible for the safety of plaintiff's property, were the agencies of government so responsible the State of Oregon, the County of Multnomah and Peninsula Drainage District No. 2?

20. Was plaintiff himself chiefly and finally responsible for the protection of his property from flood damage?

21. Are Denver Avenue and the fill supporting it dedicated to the public for highway purposes and could plaintiff or any person acquire any right whatever in connection with the Denver Avenue fill limiting or restricting its use for highway purposes?

22. Was the underpass beneath Denver Avenue constructed for a legitimate highway purpose and to meet a legitimate traffic demand; and did the con-

struction of the underpass for highway purposes violate any right of plaintiff?

23. Was the construction of the underpass beneath Denver Avenue, with the consent of the State of Oregon, the owner of Denver Avenue and the fill supporting it, in violation of any obligation owing to plaintiff or any right belonging to plaintiff?

24. Does due care and good engineering practice require the construction or maintenance of secondary levees?

25. Did the United States, its agencies or employees, have any obligation to plaintiff to build or maintain the ring levee carefully or at all?

26. Did the United States, its agencies or employees, have any obligation to plaintiff in connection with Denver Avenue, the ring levee or at all?

27. Did the United States, its agencies or employees, have any obligation whatever to protect plaintiff or his property from flood damage; but was plaintiff nevertheless greatly benefited during the 1948 high water period by the temporary protection provided by the ring levee constructed adjacent to the Denver Avenue underpass?

28. Are flood waters regarded in law as a common enemy; and does one landowner, such as the United States, have any duty to erect an embankment to protect another landowner, such as plaintiff, from flood damage; and does a landowner who erects an embankment for flood protection purposes have any duty to maintain that embankment

carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect?

29. Were Vanport and East Vanport, including the ring levee and the property upon which it was located, leased by the United States to the Housing Authority of Portland by the so-called master lease dated February 17, 1944, effective January 1, 1944?

30. Did the United States, its agencies or employees, after January 1, 1944, have any duty in connection with or any responsibility for the ring levee.

31. Did the Housing Authority of Portland have any duty to plaintiff to maintain the ring levee with due care or at all?

32. Was the ring levee maintained with due care and in accordance with good engineering practice at all times?

33. If plaintiff failed at all times prior to the 1948 flood to assert that the construction of the Denver Avenue underpass was a breach of any duty owing to him or to assert that the United States owed him any duty to build or maintain the ring levee carefully or at all or to assert that the ring levee was constructed or maintained in a negligent or wrongful fashion, has plaintiff waived his claim, if any, against the United States and is plaintiff estopped from asserting any such claim?

34. If subsequent to the construction of the ring levee and prior to the 1948 flood, plaintiff acquired

or improved his property, did plaintiff thereby assume with respect to such property the risk, if any, arising from the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee?

35. If the construction of the Denver Avenue underpass and the construction and maintenance of the ring levee constituted, as plaintiff now contends, a flood hazard to plaintiff, was plaintiff negligent in failing to take steps to protect his property against that hazard and in view of that negligence can plaintiff recover in this action?

36. Was any agency or employee of the United States authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff and was anything any employee of the United States did or did not do in that connection within the scope of his employment?

37. Is each of the claims of plaintiff barred by the statute of limitations?

38. Is each of the claims of plaintiff barred by laches and acquiescence?

39. Is each of the claims of plaintiff barred by the provisions of 33 U.S.C.A. 702c?

40. Was any act or failure to act of the United States, its agencies or employees, the proximate cause of any damage to plaintiff?

41. Did the United States, its agencies and em-

ployees, exercise due care in all matters referred to in the complaint?

42. Is the Housing Authority of Portland a federal agency within the meaning of the Tort Claims Act; are the employees of the Housing Authority of Portland employees of the United States within the meaning of that Act; and is the United States responsible for the negligence, if any, of the Housing Authority of Portland or its employees?

J. The following documents and other material have been marked as pretrial exhibits. It is agreed that each pretrial exhibit is what it purports to be and that no further authentication of any pretrial exhibit will be required. It is also agreed that no objection will be made on the ground that the original instrument is not produced. All objections on grounds of relevancy or materiality are reserved and all objections relating to competency on grounds other than authentication are also reserved including, among other things, the hearsay objection. The deposition exhibits shall be used on the terms and to the extent provided by the Federal Rules of Civil Procedure. No distinction has been made in this order between pretrial exhibits for plaintiffs and pretrial exhibits for defendant; and each party shall be free to offer in evidence, upon the terms described above, any one of the pretrial exhibits.

EXHIBITS

No. 1—Map of Peninsula Drainage District No. 1.

No. 2—Map of Peninsula Drainage District No. 2.

No. 3—Plan of the ring levee.

No. 4—Sheet of cross sections of the ring levee.

No. 5—Contract between the United States and Kaiser Company, Inc., for the construction of Vanport, dated August 1, 1942, and numbered HA (ORE 35053) cph 101.

No. 6—Subcontract dated August 15, 1942, between Kaiser Company, Inc., and George H. Buckler.

No. 7—Subcontract dated August 15, 1942, between Kaiser Company, Inc., and Charles B. Wegman.

No. 8—Contract between Kaiser Company, Inc., and Tower Sales & Erecting Company, dated October 20, 1942.

No. 9—Addendum No. 1 to contract dated October 20, 1942, between Kaiser Company, Inc., and Tower Sales and Erecting Company, Inc.

No. 10—Minutes of meeting of Oregon State Highway Commission of March 26, 1937, including resolution whereby Denver Avenue was declared to be an Oregon State Highway.

No. 11—Minutes of meeting of Oregon State Highway Commission of January 16, 1931, including resolution whereby Union Avenue was declared to be an Oregon State Highway.

No. 12—Letter from John E. Mead to State Highway Commission, State of Oregon, dated August 28, 1942.

No. 13—Letter from R. H. Baldock to John E. Mead, dated September 1, 1942.

No. 14—Letter from R. H. Baldock to T. G. Donaca, Secretary, Peninsula Drainage District No. 1, dated September 12, 1942.

No. 15—Letter from Ivan F. Phipps to Oregon State Highway Commission, dated October 10, 1942.

No. 16—Letter from R. H. Baldock to Ivan F. Phipps, dated October 13, 1942.

No. 17—Letter from J. M. Devers to Ivan F. Phipps, dated October 20, 1942.

No. 18—Letter from F. T. Young to Jerry Kelly, dated October 30, 1942.

No. 19—Drawing 6B-6-4, dated October, 1942, and accompanying letter from Mr. Young to Mr. Kelly, dated October 30, 1942.

No. 20—Drawing No. 7778 accompanying letter from Mr. Young to Mr. Kelly, dated October 30, 1942.

No. 21—Drawing No. 7779 accompanying letter from Mr. Young to Mr. Kelly, dated October 30, 1942.

No. 22—Letter from F. T. Young to Jerry Kelly, dated November 16, 1942.

No. 23—Permit from Oregon State Highway Commission to FPHA in connection with the Denver Avenue underpass, dated November 12, 1942.

No. 24—Letter dated August 25, 1943, unsigned, from Fred Christensen to George H. Buckler.

No. 25—Invoice marked paid from Fred Christensen to George H. Buckler, dated September 25, 1943.

No. 26—Order of the County Court of the State of Oregon, dated September 24, 1917, organizing Peninsula Drainage District No. 2.

No. 27—Report of Phillip H. Dater to the Board of Supervisors of Peninsula Drainage District No. 2, dated November 5, 1917.

No. 28—Minutes of special meeting of the Board of Directors of Peninsula Drainage District No. 2 held on September 18, 1942.

No. 29—Minutes of annual meeting of landowners of Peninsula Drainage District No. 2 held on October 26, 1942.

No. 30—Minutes of special meeting of the Board of Supervisors of Peninsula Drainage District No. 2 held on November 30, 1942.

No. 31—Minutes of special meeting of the Board of Supervisors of Peninsula Drainage District No. 2 held on April 19, 1943.

No. 32—Deposition of Donovan C. Byers.

No. 33—Deposition of Kenneth C. Todd.

No. 34—Deposition of Francis John Kernan.

No. 35—Deposition of Ivan F. Phipps.

No. 36—Organization papers of HAP.

No. 37—HAP bylaws.

No. 38—Lease between United States and HAP dated October 15, 1942.

No. 39—Lease between United States and HAP dated April 12, 1943.

No. 40—Lease between United States and HAP dated February 17, 1944.

No. 41—Amendment No. 1 to master lease.

No. 42—Amendment No. 2 to master lease.

No. 43—Amendment No. 5 to master lease.

No. 44—Amendment No. 6 to master lease.

No. 45—Amendment No. 7 to master lease.

No. 46—Master management resolution No. 154.

No. 47—FPHA release No. 4615:1.

No. 48—Annual contributions contract between HAP and United States, dated February 7, 1942.

No. 49—Administration fund agreement dated February 17, 1944.

No. 50—Contract for financial assistance between HAP and FPHA, dated March 16, 1943.

No. 51—Amendment to contract for financial assistance.

No. 52—Revised form of use permit HAP-216.

No. 53—Application for family dwelling HAP No. 221.

No. 54—Agreement of mutual assistance between Portland and HAP.

No. 55—HAP form of application for employment.

No. 56—HAP form entitled "Payroll Account."

No. 58—HAP form 217.

No. 59—Contract dated April 1, 1947, between HAP and Portland Building Trades Council.

No. 60—Amendment to this contract dated August 19, 1948.

No. 61—Contract between HAP and Building

Service Employees International Union Local No. 49, dated April 1, 1947.

No. 62—Contract between HAP and Upholsterers International Union Local No. 65, dated April 1, 1947.

No. 63—Contract between HAP and International Association of Machinists, dated April 1, 1947.

No. 64—Map showing ownership of land by United States east of Denver Avenue.

No. 65—Sections from FPHA Manual of Policy and Procedure as follows:

(a) Section 4110:1.
(b) Section 4110:1.
(c) Section 2114:1.
(d) Section 4110.
(e) Section 4110:3.
(f) Section 4040:1.
(g) Section 4040:3.
(h) Property Survey Action.
(j) Section 4820:5.
(k) Section 3831:1.
(l) Section 3805:4.
(m) Section 4658.1.
(n) Section 4650:1.
(o) Regional Supplement.
(p) Section 4650:6.
(q) Regional Supplement.
(r) Section 4646:1.
(s) Section 3646:8.
(t) Exhibit to same.

(u) Section 4644:6.
(v) Regional Supplement.
(w) Section 3635:5.
(x) Section 4634:1.
(y) Section 3632:1.
(z) Section 4621:1.
(aa) Section 4621.2.
(bb) Section 4621:6.
(cc) Section 3655:4.
(dd) Section 4614:4.
(ee) Section 4614:14.
(ff) Temporary Regional Circular & Supplements.
(gg) Regional Supplement.
(hh) Regional Supplement.
(ii) Section 4138:1.
(jj) Regional Supplement.
(kk) Section 4138:7.
(ii) Section 4135:5.
(mm) Section 4135:3.
(oo) Section 4135:6.
(pp) Transmittal No. 102.
(qq) Regional Supplement.
(rr) Section 4150:2.
(ss) Transmittal Bulletin No. 63.
(tt) Regional Supplement.
(uu) Regional Supplement.

No. 66—Report entitled "Completion Report, 1948 Columbia River Flood Fight, Peninsula Drainage District No. 2, Multnomah County, Oregon."

No. 67—Series of photographs taken in vicinity of Denver Avenue, A to K inclusive.

No. 68—Deed from Peninsula Industrial Company to Multnomah County, dated May 16, 1915.

No. 69—Deed from Peninsula Industrial Company to Multnomah County, dated December 21, 1926.

No. 72—Petition for reorganization of Drainage District No. 2, dated March 26, 1928.

No. 73—Order of Probate Court of Multnomah County, dated May 19, 1928, confirming the amended plan of organizations.

No. 74—Assessment of property of Drainage District No. 2, dated August 22, 1928.

No. 76—Proceedings in Civil No. 1604 in the United States District Court for the District of Oregon.

No. 77—Proceedings in Civil No. 1746 in the United States District Court for the District of Oregon.

No. 78—Proceedings in Civil No. 2333 in the United States District Court for the District of Oregon.

Conclusion

This pretrial order has been formulated after conferences at which the litigants and their respective attorneys have appeared in court. There are no issues of law or fact except those embodied in this order and this order supersedes the pleadings as to issues of law and fact. This order will control the course of the trial and shall not be amended ex-

cept by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

Dated at Portland, Oregon, this 4th day of August, 1953.

/s/ JAMES ALGER FEE,
District Judge.

Approved:

/s/ HENRY L. HESS,
United States Attorney.

.....,
Assistant United States Attorney.

/s/ WALKER LOWRY,
Special Assistant to the Attorney General.

Approved:

/s/ WM. C. RALSTON,

/s/ [Indistinguishable.]

/s/ VIRGIL CRUM,
Attorneys for Plaintiffs.

/s/ McDANNELL BROWN,
Attorney for Plaintiff Trachi.

Schedule A

C-4857 Amphitheaters Inc. vs. U.S.A.
C-4685 Bailey, Robert R. and Florence M. vs. U.S.A.
C-4806 Blake, Erwin M. and Margaret C. vs. U.S.A.
C-4858 Boyce, Elma vs. U.S.A.
C-4860 Brooks, George R. and Elva vs. U.S.A.
C-4859 Bucher, Virgil and Leanora Mae vs. U.S.A.
C-4686 Buyers, Donovan C. and Marielouise vs. U.S.A.
C-4861 Castro, Gerald and Elsie vs. U.S.A.
C-4687 Columbia River Land Company vs. U.S.A.
C-4688 Columbia Way Motel vs. U.S.A.
C-4862 Commonwealth Inc. vs. U.S.A.
C-4796 Crowley, Frank J. and Clara vs. U.S.A.
C-4797 Gazeley, H. M. and Thelma T. vs. U.S.A.
C-5331 Gerke, Walter H. et ux vs. U.S.A.
C-4863 Grant, Westley vs. U.S.A.
C-5556 Graven, Walter E. and Geraldine M. vs. U.S.A.
C-4689 Gustin, K. P. and Julia vs. U.S.A.
C-4690 Hansen, Hal vs. U.S.A.
C-4864 Helder, Daniel E. and Margaret Thake vs. U.S.A.
C-4987 Hudman, W. P. and Mary Adeline vs. U.S.A.
C-5557 Jenkins, John F. and Valera vs. U.S.A.
C-5645 Keen, Charles M. and Penelope J. vs. U.S.A.
C-4568 Kernan Livestock Farm Inc. vs. U.S.A.

C-4798 Klahn, Richard H. and Gladys H. vs. U.S.A.
C-4799 Krieger, John M. and Levina J. vs. U.S.A.
C-4807 Krimbel, Robert J. and Harriette S. vs. U.S.A.
C-5315 Krueger, Herbert Jr. et ux. vs. U.S.A.
C-4691 Leaverton, J. Karl and Louise vs. U.S.A.
C-4800 Liles, Walter Theodore vs. U.S.A.
C-4808 Marvel, A. R. and Dorothy L. vs. U.S.A.
C-4693 Matheny A. W. and George vs. U.S.A.
C-4692 Matheny & Bacon Inc. vs. U.S.A.
C-4694 McMahon, Pearl vs. U.S.A.
C-4865 Merrifield, Roy R. and Frances vs. U.S.A.
C-4866 Milbrandt, W. W. and Ruth M. vs. U.S.A.
C-4867 Northwest Properties Inc. vs. U.S.A.
C-5459 N. W. Sports, Inc. vs. U.S.A.
C-4695 Oregon Sportservice, Inc. vs. U.S.A.
C-4868 Peck, Elwin C. and Cleo E. vs. U.S.A.
C-4869 Phipps, Ivan F. and Dorothy S. vs. U.S.A.
C-4870 Plunkett, James A. and Lucille vs. U.S.A.
C-4696 Portland Meadows vs. U.S.A.
C-4801 Powers, Frank J. vs. U.S.A.
C-4871 Romeiko, Joe and Julia vs. U.S.A.
C-4802 Schlesser, C. C. vs. U.S.A.
C-5603 Seivert, R. A. et al. vs. U.S.A.
C-4809 Tylden, Jennings E. and Byrnece vs. U.S.A.
C-4872 Warren Packing Co. vs. U.S.A.
C-4803 Weiler, Max W. and Marxan vs. U.S.A.
C-5549 Wickstrom, Nels F. et ux vs. U.S.A.
C-5633 Charles Trachi vs. U.S.A.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

OPINION

February 23, 1954

James Alger Fee, Chief Judge:

The plaintiffs, owners of property within the boundaries of Peninsula Drainage District No. 2, brought actions in fifty-two several cases against the United States for damage caused by floodwaters to their individual properties.

There was a comprehensive pretrial order and a trial. The facts are.

On May 16, 1915, Peninsula Industrial Company conveyed to Multnomah County a strip of land cutting through a large body of property, most of which, in the absence of protecting dikes, would be inundated during periods of normal flow of the Columbia River, the waters of which ran either in the channels or sloughs on all sides of this body of land. The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the county. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank.

On March 26, 1937, this highway, then called Denver Avenue, was conveyed to the Oregon State Highway Commission. This was the boundary ac-

cepted by two drainage districts, called, respectively, Peninsula Drainage District No. 1, which was downstream, and Peninsula Drainage District No. 2, which was upstream. Plaintiffs in these cases own property in the latter, which was organized under the drainage district laws of the State of Oregon in 1917. District No. 1 was protected from flood on the north, west and south by railroad fills and by constructed levees, none of which was owned or managed by the United States. These same works protected District No. 2 on its western side. District No. 2 built dikes between 1917 and 1921 on its north, south and east sides, which connected with the works of District No. 1 above described, and thus accomplished complete circumvolution of both. Neither district spent time or money in attempting to strengthen the mound carrying Denver Avenue.

Between 1934 and 1944, the United States, acting under the authority of Congress, reconstructed the north, south and east levees of District No. 2 with concrete walls and earth fills. Control of these levees was formally surrendered to District No. 2 on August 2, 1944. Although the work and the plans therefor were approved by District No. 2, there was no request by anyone that the Denver Avenue fill be strengthened as part of the protective works.

The United States, also pursuant to congressional authority, rebuilt the north and south levees of

District No. 1. Notwithstanding the plans for the work were approved by District No. 1, there was no suggestion from anyone that the western embankment, owned and in control of the railroads but adopted by both districts as an existing work, should be reconstructed or strengthened by the United States.

In 1942, the government condemned a great portion of the land in District No. 1, and the City of Vanport was erected thereon. Control of this area was eventually placed in the Portland Housing Authority.[1] The State Highway Commission, which had already constructed two underpasses[2] in Denver Avenue, was requested to and did build with federal funds an underpass through the fill for the convenience of persons living in both drainage districts. No protest was made by District No. 2, nor any suggestion by anyone that District No. 2 needed protection from waters from the west. It is true, a resolution mildly suggesting that objection to the construction of the underpass without a "stop log" was passed by its board of directors and placed among the minutes of the Board, but it seems never

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[1]The Portland Housing Authority is a federal agency and its employees are employees of the government. But that does not help the plaintiffs. Clark vs. United States, 109 F. Supp. 213, 223.

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[2]One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and the other affected the system in no way but to lower the Denver Avenue fill by four feet.

to have been called to the attention of anyone outside this group.

However, upon protest of District No. 1, a ring levee was built on land condemned by the federal government at the opening of the underpass upon the upriver side in District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 were overtopped. As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers. This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed.

On May 30, 1948, between 4:00 p.m. and 4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment, which was the railroad fill adapted by these districts, failed, permitting the water flooding to overflow that area. The waters were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m., on May 31, 1948, when the ring levee constructed on the east of the underpass to protect District No. 1 from water approaching from that direction failed, and, as a result, District No. 2 and the properties of plaintiffs were inundated.

This is a case of afterthought, not forethought, on the part of plaintiffs and District No. 2.

These landowners themselves continuously excluded the Columbia River from part of its ancient bed for their own purposes. For the major portion of their lands are below the originary high water level of the Columbia River and in places more than thirty-two feet below the flood level reached at the time of the failure of the western embankment of District No. 1.

In order to construct or to have benefit of defensive works, these landowners or their predecessors, under Oregon statutes, formed a drainage district which was endowed with certain sovereign powers and was charged, as was each acre within its boundary, with the responsibility of erecting adequate works for protecting lands from overflow.[3] This duty was continuous and involved repair, maintenance and strengthening of existing walls.

The very purpose of the creation of this subdivision of the State of Oregon was that protective function. This is the law and essence of its being. In accordance with the immemorial custom of the village communities of early England[4] and a like

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[3]Oregon Laws, 1915, c. 340, provides that a drainage district may be formed for the purpose of having the lands within it "reclaimed, and protected * * * from the effects of water, * * *." See O.R.S. 547.005.

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[4]It is pointed out in the Introduction to A Terrier of Fleet Lincolnshire, Nielson (Oxford University Press, 1920), a manuscript, the latest document of which is dated 1320, that the incidence of the duty to repair dikes was customarily apportioned among

policy crystallized in the statute law of the State of Oregon,[5] this Court has held that the burden of maintaining adequate seawalls and works for drainage runs with each acre of the protected lands, no matter if the sovereign be the owner.[6] This municipality, not the United States, is charged with the responsibility for prevention of overflow of water upon lands belonging to the individual plaintiffs. These very plaintiffs, as owners of such lands, owed the duty of protection to the whole area within the municipality.

District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.[7] This the District had a legal right to do under

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the land affected. "In Walsoken, for example, every acre repaired four feet of sea-bank and one foot of Podike; every acre in West Walton repaired six feet two inches of sea-bank and one foot of Podike." (p. xiv). See also II Cooley's Blackstone 908 (Book III) (4th Ed., 1899).

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[5]Oregon Laws, 1915, c. 340, § 17, provides that the costs of constructing and maintaining protective works shall "be apportioned to and levied on each tract of land within said district * * *." Laws, 1921, c. 14, provides that "lands belonging to the State of Oregon * * * shall be subject to the same burdens and liabiilties * * * as lands in said district belonging to private individuals." O.R.S. 547.455.

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[6]United States vs. Florea, 68 F. Supp. 367. See also United States vs. Aho, 68 F. Supp. 358.

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[7]The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected "by

the statutes of the state.[8] The breaking of the western embankment upon which these landowners relied for safety was the sole cause of disaster. It has already been decided that the United States owed no duty to insure the stability of the western wall.[9] The government had not built this rampart, did not own it, did not own the ground upon which it stood, and did not at the date of failure and had not previously exercised any control over this structure designed to carry railroads.

The government did not construct or have control over Denver Avenue or the bypass, although this was built with federal funds, and the ring levee stood on lands which it had condemned. Denver Avenue was not designed as a water repellant wall.[10]

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its west, north, and south levees, connecting with system No. 2." District No. 2 planned to construct levees on the east, north and south. The plan concluded, "It is apparent that this will affect a complete closure of the land included in this district against high water."

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[8]Oregon Laws, 1915, c. 340, § 29. O.R.S. 547.315.

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[9]Clark vs. United States, 109 F. Supp. 213, 220: "No duty of the United States to maintain this embankment can be discovered * * *."

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[10]Plaintiffs contend that language of the deed from Peninsula Industrial Company to Multnomah County establishes their right to have Denver Avenue maintained as a dike. They place their reliance on the following: "* * * this conveyance is

It is specifically stated that no reliance was placed upon it, and it is mentioned only casually as furnishing additional protection.[11] In fact, it did so even in this disaster. But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke.

It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby.[12] But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and as-

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made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *."

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[11]The Plan for Reclamation of District No. 2 states: "* * * this fill upon completion of District No. 2 will not act as a dike. * * * It will, however, constitute an additional element of security * * *."

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[12]For example, one who suddenly releases flood waters from a dam is held liable for the damage caused thereby. Crawford vs. Cobbs & Mitchell, 121 Oregon 628; Loveless vs. Ruffcorn, 143 Iowa 221; House vs. Los Angeles County Flood Control District, 25 Cal. 2d 384.

sessment for these express purposes.[13] Therefore, the cutting of the underpass and the failure to provide unbreakable work may have been a condition which resulted in damage, but it was not a cause, proximate or otherwise.

But, it is said, the Court is bound by its previous decisions,[14] the principles of which fix liability here on the United States. It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages.[15] Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute.[16] Furthermore, the particular agent who performed the act or was guilty of the omission need not be pointed out and proved by name.[17]

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[13]Oregon Laws, 1915, c. 340; O.R.S. 547.305, 547.455, et seq.

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[14]Plaintiffs cite two decisions of this Court in support of their contentions, Ure vs. United States, 93 F. Supp. 779, and United States vs. Florea, 68 F. Supp. 367. They attempt to distinguish Clark vs. United States, 109 F. Supp. 213, which denied to residents of Vanport recovery for damages caused by the same disaster as involved herein.

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[15]Clark vs. United States, 109 F. Supp. 213, 223.

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[16]Ure vs. United States, 93 F. Supp. 779, 792.

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[17]This implication seems to arise from the language of the Court in the case of Dalehite vs. United

Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government officer or agent.[18] The exercise of administrative

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States, 346 U. S. 15, 44-45, where it is said: "It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. * * * But the statute requires a negligent act." These two sentences are diametrically inconsistent. For the purposes of clarity, it is noted that, in the instant case, this Court, in finding no liability here, does not rely upon the fact that the individual agents of the government are not named or designated. The statute says, "The United States shall be liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstances." If, under the law of the state, a private individual could be held for release of waters over the land of another, the United States can be also. Inaccurately labeling the state doctrine as one invoking "liability without fault" by arbitrary fiat determines there can be no fault except negligence. Here this Court only holds that a private person would not be liable under the exact circumstances.

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[18]In order to make this clear, the Court draws a vital distinction between injuries which are the direct result of the plan adopted in discretion and the result of carelessness or wilfullness in execution or result in a direct trespass illegally. If in discretion, it is decided to poison coyotes, the government will still be liable, as would a private person, for setting a spring gun without proper safeguards to discharge the poison into the mouth of the animal (Worley vs. United States, Civ. 5336, opinion dated November 17, 1952, D.C. Ore.), where the detonating of explosive caused direct trespass to plaintiff's lands even if discharged according to plans, the United States should be liable. Boyce vs. United

discretion as a result of "policy judgment and discretion" may free the government from liability in handling explosives necessary for national defense in time of war.[19] But the application of such a principle here or in the cases just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong.[20]

Here, the United States is not liable. The government owed no duty to these landowners. The employees of the Portland Housing Authority are not shown to have done anything legally significant. The United States was not responsible for the failure of the western embankment, which was the sole cause of disaster. The government had not deliberately banked waters high over the lands of plaintiffs and permitted these to overflow. No lia-

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States, 93 F. Supp. 866 should be disapproved, since the individual who set off the blast could have been held personally liable for trespass even though they followed the plan and were employed by the United States. The reason why the result in Thomas vs. United States, 81 F. Supp. 881, is correct is because of the statute exonerating the United States from damage by flood. The Court is carefully refraining from basing nonliability upon the discretionary clause of the statute which only covers injuries resulting directly from major policy decisions.

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[19]Dalehite vs. United States, supra.

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[20]Justice Jackson, dissenting in Dalehite vs. United States, 346 U. S. 15, 60, expresses a fear that the interpretation therein of the Tort Claims Act merely amends the ancient adage to read, "The King can do only little wrongs."

bility was thus established by creating a highly dangerous situation.[21] These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred.[22] So there could be no trespass. The government agents were not in control of the waters so that the doctrine of res ipsa loquitur would apply.[23] No act or omission was proved which constituted negligence on the part of any agent of the government. Finally, the United States is not liable for damage caused by flood.[24]

Findings, conclusions and judgment in accordance herewith and in favor of the United States should be drawn by the attorneys and submitted to the Court.

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[21]Oregon cases dealing with liability for damage caused by the creation of highly dangerous conditions and the theories on which such liability is based are discussed in Ure vs. United States, 93 F. Supp. 779, 788-791.

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[22]The United States was held liable for damage negligently caused by a break in a canal built high on a hillside, flooding plaintiff's lands. Ure vs. United States, 93 F. Supp. 779.

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[23]The "control" required before the doctrine of res ipsa loquitur may be applied is carefully analyzed in Gow vs. Multnomah Hotel, Inc., 191 Oregon 45.

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[24]"No liability of any kind shall attach to or rest upon the United States for any damage from or by floodwaters at any place." 33 U.S.C.A. § 702(c). Clark vs. United States, 109 F. Supp. 213.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These cases (Nos. 5190, 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331, 4863, 5556, 4689, 4690 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549 and 5633) were consolidated and tried during August, 1953, before the above-entitled Court, the Honorable James Alger Fee, Chief Judge, presiding and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed and submitted to the Court for consideration and decision. After due consideration the Court, being fully advised, makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. The Court by this reference adopts as part of these findings of fact the findings of fact in the opinion of the Court on file in these consolidated cases and the Statement of Agreed Facts set forth in Paragraphs 1 to 20, inclusive, of Section C of the pretrial order on file herein.

2. On May 16, 1915, Peninsula Industrial Company conveyed to Multnomah County, Oregon, a strip of land cutting through a large body of prop-

erty, most of which, in the absence of protecting dikes, would be inundated during periods of normal flow of the Columbia River, the waters of which ran either in channels or sloughs on all sides of this body of land. The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the County. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank. This highway became known as Denver Avenue. On March 26, 1937, the Oregon State Highway Commission took over control of Denver Avenue by resolution of the State Highway Commission and on that date Denver Avenue became an Oregon State highway. Since then Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department.

3. Denver Avenue was the boundary accepted by two drainage districts called, respectively, Peninsula Drainage District No. 1, which was downstream, and Peninsula Drainage District No. 2, which was upstream. District No. 1 was protected from flood on the north, west and south by railroad fills and levees. District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1), as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None

of these fills, dikes and levees was owned or controlled by the United States.

4. In 1942 the United States condemned a great portion of the land in District No. 1 and the City of Vanport was erected thereon. For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. The underpass was built with the approval and under the supervision of the Oregon State Highway Commission. No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objection to the construction of the underpass without a stoplog structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group.

5. Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 (which were lower than those of District No. 1), were overtopped. As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948, the western embankment of District No. 1 failed.

6. On May 30, 1948, between 4:00 p.m. and

4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment at District No. 1 failed, permitting the flood waters to overflow that area. The flood waters, approaching Denver Avenue from the west, were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m. on May 31, 1948, when the ring levee constructed on the east of the Denver Avenue underpass failed. Thereupon District No. 2 and the properties of plaintiffs were inundated.

7. The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. The United States had not built the western embankment, did not own it, did not own the ground upon which it stood and did not at the date of failure and had not previously exercised any control over the structure. The United States had no duty to insure the stability of the western embankment. The cause of the failure of the western embankment has not been shown and appears to be unknown. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure.

The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. In the period between 1934 and 1944, the United States, acting through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2. District No. 2 approved the plans for the work but made no request that Denver Avenue be strengthened as part of the protective works. Denver Avenue was built and has ever since been used for highway purposes. Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes.

9. The flood water which inundated plaintiffs' property approached Denver Avenue and the ring levee from the west. In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances

unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen.

10. Peninsula Drainage District No. 2, in which plaintiffs' property was located, was organized by plaintiffs or their predecessors in interest under the drainage district laws of Oregon in 1917. District No. 2 was endowed with certain sovereign powers and was charged, as was each acre within its boundaries, with the responsibility of erecting adequate works for protecting the district lands from overflow. This duty was continuous and involved repair, maintenance and strengthening of existing walls and structures. District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the district. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs.

11. The Housing Authority of Portland is a

federal agency and its employees are employees of the United States.

12. The employees of the Housing Authority of Portland are not shown to have done anything legally significant. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees.

13. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the United States or its employees or that plaintiffs suffered damage on that account.

14. Plaintiffs have failed to prove that the construction of the Denver Avenue underpass or the construction or maintenance of the ring levee surrounding that underpass violated any right of plaintiffs, that the ring levee was inadequate for the purpose intended or that, under the circumstances, the purposes for which the ring levee was constructed were not the proper purposes.

15. The contentions of plaintiffs as set out in the pretrial order that the construction of the Denver Avenue underpass was negligent, wrongful and a trespass on plaintiffs' property, that the Denver Avenue fill constituted a levee and, as such, part of the plan for reclamation of District No. 2, that plaintiffs relied on the Denver Avenue fill as security against flood waters, that the ring levee around the Denver Avenue underpass was inadequate and unsuitable for the purpose intended, that the ring levee was negligently maintained and constituted a nuisance, and that the County of Mult-

nomah and its successors in interest had an obligation to maintain the Denver Avenue fill as a dike, have not been proved.

16. The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees.

Conclusions of Law

1. The Court by this reference adopts the conclusions of law set forth in the opinion of the Court on file in these consolidated cases.

2. The jurisdiction of this Court is invoked under the provisions of the Federal Tort Claims Act.

3. The legal rights and duties of the parties to these actions depend on the Federal Tort Claims Act and the law of Oregon.

4. Under the law of Oregon damages can be recovered only if a duty is owing from the defendant, the defendant has breached that duty and injury and damage have resulted to the plaintiff for which the breach of duty is the proximate cause.

5. Under the law of Oregon the legal duty to protect plaintiffs' property from flood damage rested on Peninsula Drainage District No. 2 and on plaintiffs themselves as land owners within the district. This duty was continuous and involved the repair, maintenance and strengthening of existing

flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage.

6. The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had causal connection with any damage to plaintiffs' property.

7. Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act.

8. The provisions of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and it is not repealed by the Federal Tort Claims Act.

9. The United States is entitled to judgment.

10. Each party shall bear his or its own costs of suit.

These findings of fact and conclusions of law are in accordance with the pretrial order, the record made on the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases.

Dated: September 14, 1954.

/s/ JAMES ALGER FEE,
Circuit Judge; Sitting by
Special Assignment.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 14, 1954.

In the District Court of the United States
for the District of Oregon
Civil No. 5190
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

These cases (Nos. 5190, 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331, 4863, 5556, 4689, 4690, 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549 and 5633), were consolidated and tried during August, 1953, before the above-entitled Court, the Honorable James Alger Fee, Chief Judge, presiding and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed

and submitted to the Court for consideration and decision. After due consideration the Court, being fully advised, and having reached its decision and having made and filed its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That plaintiffs, and each of them, take nothing by their complaint;

2. That each party bear its or his own costs.

Dated: September 14, 1954.

/s/ JAMES ALGER FEE.
Circuit Judge; Sitting by
Special Assignment.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, Defendant, and to C. E. Luckey, United States Attorney for the District of Oregon, Herbert Brownell, Attorney General of the United States of America, and Walker Lowry, Special Counsel, Attorneys for Defendant:

Please Take Notice that the plaintiffs in the above-entitled cause, and each and all of the plaintiffs in the following related and consolidated cases, to wit, No. C-4857 Amphitheaters, Inc., an Oregon corporation, No. C-4806 Erwin M. Blake and Mar-

garet C. Blake, No. C-4685 Robert R. Bailey and Florence M. Bailey, No. C-4858 Elma Boyce, No. C-4859 Lenora Mae Bucher, Administratrix of the Estate of Virgil Bucher, Deceased, and Lenora Mae Bucher, No. C-4686 Donovan C. Byers and Marie Louise Byers, No. C-4860 George R. Brooks and Elva Brooks, No. C-4796 Frank J. Crowley and Clara Crowley, No. C-4687 Columbia River Land Company, a corporation, No. C-4688 Columbia Way Motel, a corporation, No. C-4862 Commonwealth Inc., an Oregon corporation, No. C-4861 Gerald Castro and Elsie Castro, No. C-4797 H. M. Gazeley and Thelma T. Gazeley, No. C-4863 Westley Grant, No. C-4689 K. P. Gustin and Julia Gustin, No. C-4690 Hal Hansen, No. C-4568 Kernan Livestock Farm Inc., No. C-4798 Richard H. Klahn and Gladys M. Klahn, No. C-4799 John M. Krieger and Levina J. Krieger, No. C-4807 Robert J. Krimbel and Harriette S. Krimbel, No. C-4864 Neal R. Crounse, Administrator of the Estate of Daniel E. Helder, Deceased, and Margaret Thake, No. C-4691 Anna Leaverton, Executrix of the Estate of J. Karl Leaverton, Deceased, and Anna Louise Leaverton, No. C-4800 Walter Theodore Liles, No. C-4808 A. R. Marvel and Dorothy L. Marvel, No. C-4866 W. W. Milbrandt and Ruth M. Milbrandt, No. C-4693 A. W. Matheny and George Matheny, No. C-4692 Matheny & Bacon Inc., a corporation, No. C-4694 Pearl McMahon, No. C-4685 Roy R. Merrifield and Frances Merrifield, No. C-4867 Northwest Properties Inc., an Oregon corporation, No. C-4695 Oregon Sportservice, Inc., an Oregon corporation, No.

C-4868 Elwin C. Peck and Cleo E. Peck, No. C-4696 Portland Meadows, a corporation, No. C-4870 James A. Plunkett and Lucille Plunkett, No. C-4801 Frank J. Powers, No. C-4869 Ivan F. Phipps and Dorothy S. Phipps, No. C-4871 Joe Romeiko and Julia Romeiko, No. C-4802 C. C. Schlesser, No. C-4809 Jennings E. Tylden and Byrnece Tylden, No. C-4803 Max W. Weiler and Marian Weiler, No. C-4872 Warren Packing Company, an Oregon corporation, Ivan F. Phipps and Dorothy S. Phipps, husband and wife, and T. G. Donaca and Marjorie C. Donaca, husband and wife, No. C-4987 W. P. Hudman and Mary Adeline Hudman, No. C-5556 Walter E. Graven and Geraldine M. Graven, No. C-5557 John F. Jenkins and Valera Jenkins, No. C-5645 Charles M. Keen and Penelope J. Keen, No. C-5459 Northwest Sports, Inc., an Oregon corporation, No. C-5603 R. H. Seivert and Doris Seivert, No. C-5633 Charles Trachi, No. C-5315 Herbert B. Krueger, Jr., and Alleen E. Krueger, No. C-5549 Nels F. Wickstrom and Hazel Wickstrom, and No. C-5331 Walter Gerke and Florence Gerke, appeal from the judgment entered in the above-entitled cause and related cases on the 14th day of September, 1954, and from the whole thereof, to the United States Court of Appeals, for the Ninth Circuit.

/s/ VIRGIL CRUM,

/s/ WM. C. RALSTON,

Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas Mearl C. Tillman and Emily P. Tillman, Plaintiffs, and each and all of the plaintiffs in the related and consolidated cases, to wit: No. C-4857, Amphitheaters, Inc., an Oregon corporation; No. C-4806, Erwin M. Blake and Margaret C. Blake; No. C-4685, Robert R. Bailey and Florence M. Bailey; No. C-4858, Elma Boyce; No. C-4859, Lenora Mae Bucher, Administratrix of the Estate of Virgil Bucher, Deceased, and Lenora Mae Bucher; No. C-4686, Donovan C. Byers and Marie Louise Byers; No. C-4860, George R. Brooks and Elva Brooks; No. C-4796, Frank J. Crowley and Clara Crowley; No. C-4687, Columbia River Land Company, a corporation; No. C-4688, Columbia Way Motel, a corporation; No. C-4862, Commonwealth, Inc., an Oregon corporation; No. C-4861, Gerald Castro and Elsie Castro; No. C-4797, H. M. Gazeley and Thelma T. Gazeley; No. C-4863, Westley Grant; No. C-4689, K. P. Gustin and Julia Gustin; No. C-4690, Hal Hansen; No. C-4568, Kernan Livestock Farm, Inc.; No. C-4798, Richard H. Klahn and Gladys M. Klahn; No. C-4799, John M. Krieger and Levina J. Krieger; No. C-4807, Robert J. Krimbel and Harriette S. Krimbel; No. C-4864, Neal R. Crounse, Administrator of the Estate of Daniel E. Helder, Deceased, and Margaret Thake; No. C-4691, Anna Louise Leaverton, Executrix of the Estate of J. Karl Leaverton, Deceased. and Anna Louise

Leaverton; No. C-4800, Walter Theodore Liles; No. C-4808, A. R. Marvel and Dorothy L. Marvel; No. C-4866, W. W. Milbrandt and Ruth M. Milbrandt; No. C-4693, A. W. Matheny and George Matheny; No. C-4692, Matheny & Bacon, Inc., a corporation; No. C-4694, Pearl McMahon; No. C-4685, Roy R. Merrifield and Frances Merrifield; No. C-4867, Northwest Properties, Inc., an Oregon corporation; No. C-4695, Oregon Sportservice, Inc., an Oregon corporation; No. C-4868, Elwin C. Peck and Cleo E. Peck; No. C-4696, Portland Meadows, a corporation; No. C-4870, James A. Plunkett and Lucille Plunkett; No. C-4801, Frank J. Powers; No. C-4869, Ivan F. Phipps and Dorothy S. Phipps; No. C-4871, Joe Romeiko and Julia Romeiko; No. C-4802, C. C. Schlesser; No. C-4809, Jennings E. Tylden and Byrnece Tylden; No. C-4803, Max W. Weiler and Marian Weiler; No. C-4872, Warren Packing Company, an Oregon corporation; Ivan F. Phipps and Dorothy S. Phipps, husband and wife, and T. G. Donaca and Marjorie C. Donaca, husband and wife; No. C-4987, W. P. Hudman and Mary Adeline Hudman; No. C-5556, Walter E. Graven and Geraldine M. Graven; No. C-5557, John F. Jenkins and Valera Jenkins; No. C-5645, Charles M. Keen and Penelope J. Keen; No. C-5459, Northwest Sports., Inc., an Oregon corporation; No. C-5603, R. H. Seivert and Doris Seivert; No. C-5633, Charles Trachi; No. C-5315, Herbert B. Krueger, Jr., and Alleen E. Krueger; No. C-5549, Nels F. Wickstrom and Hazel Wickstrom, and No. C-5331, Walter

Gerke and Florence Gerke, appeal to the United States Court of Appeals of the Ninth Circuit from a certain judgment in the above-entitled cause and related cases dated September 14, 1954.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland and empowered to become surety upon bonds, undertakings, etc., does hereby undertake and promise, on the part of the appellant, that said appellant will pay all costs in a sum not exceeding Two Hundred Fifty and No/100 ($250.00) Dollars, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Signed and sealed this . . day of November, 1954.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ CLARENCE D. PORTER,
Attorney-in-Fact.

Countersigned:

/s/ CLARENCE D. PORTER,
Resident Agent.

Service of Copy acknowledged.

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause.]

ORDER

This Cause coming on for hearing upon stipulation by counsel for plaintiffs in the above-entitled cause and related and consolidated cases, and counsel for defendant, and the Court being fully advised in the premises:

It Is Hereby Ordered that upon the appeal of this case to the United States Circuit Court of Appeals, for the Ninth District, that the pleadings in the above-entitled cause are typical of the pleadings in all related and consolidated cases and the issues involved are identical; that the pleadings in this case, Tillman vs. United States of America, No. 5190, only shall be forwarded to the Circuit Court of Appeals and shall apply to all related and consolidated cases, and the decision of the said Circuit Court of Appeals will be applied to and followed in all related and consolidated cases.

It Is Further Ordered that the original files, including the pleadings, findings, judgment, pretrial order, transcript of evidence, and all other original files in the case of Tillman vs. United States of America, No. 5190, shall be forwarded to the Circuit Court of Appeals for the record on the appeal in these cases.

It Is Further Ordered that since there is a multitude of exhibits as well as a considerable portion of the pretrial order and other evidence and matters produced which are unnecessary to the determination of the issues arising upon the appeal, that it

shall only be necessary to print such portions as the plaintiffs and defendant may desire, either by stipulation or by notice in the usual manner as provided by the rules of said Circuit Court of Appeals, for the Ninth District.

That subject to and with the consent of said Circuit Court of Appeals either party may refer to or use any portions of the record not so printed in their briefs or arguments and this record shall be sufficient to question any order, judgment, finding, or decree on the grounds that it is not supported by the evidence.

Dated, this 9th day of November, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

Service of copy acknowledged.
[Endorsed]: Filed November 9, 1954.

United States District Court
District of Oregon
Civil No. 5190
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

August 4, 1953.

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

W. K. PHILLIPS,
WILLIAM C. RALSTON,
VIRGIL CRUM, and
KERMIT SMITH,

Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney-General,
Of Attorneys for the Defendant.

HENRY L. HESS,
United States Attorney, for the District of Oregon,

Of Attorneys for the Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: You may proceed, gentlemen.

Mr. Phillips: If it please your Honor, I think counsel for all of the plaintiffs and the Government have worked out a plan of trial or procedure in this action which we would like to submit to your Honor for your approval if you can go along with us. I think it would facilitate greatly the trial.

We have agreed and have had marked the pre-trial exhibits consecutively, and not by Plaintiff and Defendant.

The Court: Yes.

Mr. Phillips: The reason for that being that both parties desire to use all of the exhibits or any

one of them that they see fit, and we have so stipulated, with the approval of your Honor.

The Court: Yes.

Mr. Phillips: I think the pre-trial order, with the exception, of course, of the historical background and that sort of thing, and incidentals, has been based practically all upon these exhibits. We thought in that way that in both briefing and argument it would help counsel and also your Honor if we could do it that way, and offer the pre-trial exhibits consecutively and all at one time without specifying each and every one, if that is agreeable to your Honor.

The Court: Yes.

Mr. Phillips: At this time, if the Court please, the plaintiffs would offer Pre-Trial Exhibits 1 to 78, inclusive, excepting, however, your Honor, Pre-Trial Exhibit 32, Pre-Trial Exhibit 33, Pre-Trial Exhibit 34 and Pre-Trial Exhibit 35, [2*] which are depositions that we will offer soon; also excluding Pre-Trial Exhibits T-4 and T-5, which are minutes of a meeting that are not in the pre-trial exhibits and I don't believe will be produced as exhibits in this case.

We offer them at this time, if the Court please.

Mr. Lowry: Your Honor, the Government has no objection. I think, though, the record ought to show that some of the documents which we have marked as pre-trial exhibits and which Mr. Phillips has just offered turned out to be unavailable and,

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

hence, there can be no offer of those documents. Simply for the purpose of keeping the Clerk from looking for documents that do not exist, may I note that there is no Exhibit 57. there is no Exhibit 65-i, there is no Exhibit 70, and Exhibit 71 is a repetition of an earlier exhibit number, so that there is no Exhibit 71, nor at this time, at least, is there any Exhibit 75.

Mr. Phillips: I didn't know that. your Honor. I have no pride of authorship here. I would like to withdraw the offer of those specific exhibits.

The Court: I will strike those out of the pre-trial order.

Mr. Lowry: That is quite satisfactory.

The Court: Or will show in the pre-trial order that they are not available. Subsequently, if you get any of them then they can be submitted.

Mr. Lowry: With that exception, your Honor, the Government [3] has no objection.

The Court: All right. The eliminations are made, and the Court admits all the other exhibits, with the exceptions mentioned, by the consent of the United States.

Mr. Phillips: That is correct, your Honor.

(Whereupon the documents above referred to, marked as Pre-Trial Exhibits 1 to 78, inclusive, with the exception of Pre-Trial Exhibits 32, 33, 34, 35, 57, 65-i, 70, 71 and 75, were received in evidence.)

Mr. Phillips: We also have another idea, your Honor, that we all think to be a good one, if your

Honor will go along with us, and that is as to Exhibits 32, 33, 34 and 35, which are depositions of witnesses that have been taken. Both parties believe that in briefing this case or in argument we would like to have these depositions in place and stead of having to have the testimony of the witnesses transcribed, and we would like very much to use the depositions in place and stead of the testimony of the witnesses, if your Honor would agree to that.

The Court: Yes.

Mr. Phillips: I might say to your Honor there is in Exhibit No. 32 one question, I believe, that the Government is objecting to and which we have agreed with the Government should not be in there. That is the last answer on Page 13 [4] of Exhibit 32. I believe that is the only objection the Government has, to that one answer, and we agreed to have that stricken, your Honor.

The Court: Yes.

Mr. Lowry: Your Honor, Mr. Phillips is right. We have no objection. I would like to say just this much, though: As your Honor will discover, these depositions were taken by the Government for discovery purposes. That meant, of course, that we asked all the questions we could think of, and we listened to rumors and speculation and that sort of thing which normally would not be presented in the course of the trial. I think, however, that your Honor will see as readily as we do what part of this evidence is really within the knowledge of the vari-

ous deposing witnesses, and accordingly, as I have said, we have no objection to the offering of this evidence.

The Court: The depositions are admitted with the exceptions set out.

Mr. Phillips: Thank you.

(The depositions above referred to, marked as Pre-Trial Exhibits 32, 33, 34 and 35, were received in evidence.)

Mr. Phillips: Call Mr. Tillman. [5]

MEARL C. TILLMAN

one of the Plaintiffs herein, was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Mr. Tillman, you are a plaintiff in this case, I believe? A. Yes, sir.

Q. Where do you live, Mr. Tillman?

A. 819 North Marine Drive.

Q. How long have you lived in Oregon?

A. Sir?

Q. How long have you lived in Oregon?

A. That would be about 46 years.

Q. In 1948 by whom were you employed?

A. The Sheriff's office, Multnomah County.

Q. In what capacity?

A. Captain in the Uniform Division.

(Testimony of Mearl C. Tillman.)

Q. In April and May, 1948, what was your district?

A. I was Captain in charge of Vanport Precinct.

Q. Are you an owner of property in District No. 2, Drainage District No. 2, in Multnomah County, Oregon? A. Yes, sir.

Q. How long have you been an owner of property?

A. I bought that property in May, 1945.

Q. Were you present at the time of the breaking of the ring [6] dike and levee—can't you hear me?

A. No.

Q. Were you present at the time of the breaking of the dike and the ring levee which surrounded the underpass on Denver Avenue in May of 1948?

A. Yes, sir.

Q. Had you at any time inspected that ring dike around the underpass?

A. No, I can't say that I inspected that except after the flood. After Vanport had been flooded, then I did notice it once, but prior to that time, no.

Q. That was at the time that the water was up against it?

A. Against Denver Avenue, yes.

Q. That was when you inspected it. Now, what was the situation along Denver Avenue at that time, from the 30th of May until—can you tell us when it was? I believe it is stipulated in the pre-trial order, but do you know when the original break occurred in District No. 2, or about what time?

A. I wasn't on Denver Avenue when it went through Denver Avenue, if that is the question, sir.

(Testimony of Mearl C. Tillman.)

Q. Do you know how long it was from the time that the original dike broke in District No. 1 until the dike broke up at Denver Avenue? Do you know how long a time that was?

A. I think we figured that it was about 30 hours, sir.

Q. Where did the Denver Avenue obstruction to the water break? [7] A. Denver Avenue?

Q. Yes.

A. At almost the center of the fill at the entrance to Vanport.

Q. That would be what we have been referring to as the ring dike? A. Yes, sir.

Q. Were there any other breaks on Denver Avenue with the exception of that ring dike?

A. There was a leak below or south of the ring dike about, oh, I would judge approximately 75 feet, and that was stopped prior to the time that it went through Denver Avenue.

Q. What effect did this break have on your property? A. A complete loss.

Q. I don't mean that. Was it flooded? That is, was your property one that was flooded?

A. Yes, sir.

Q. Were there any other dikes or dividing lines between District No. 1 and Drainage District No. 2 except Denver Avenue and that ring dike?

A. Not to my knowledge; no, sir.

Q. Do you know? A. There wasn't.

Mr. Phillips: I think that is all. [8]

(Testimony of Mearl C. Tillman.)

Cross-Examination

By Mr. Lowry:

Q. Mr. Tillman, where was your property located with respect to Union Avenue? Was it east or west of Union Avenue?

A. It is east of Union Avenue, north and east.

Q. That means, then, that before your property was actually flooded Union Avenue, too, had to fail; is that right? A. That is right, sir.

Q. I am not sure I understood whether you said you were present when the ring levee failed or not.

A. I was on the job, sir, but not on Denver Avenue at the time that it broke.

Q. I believe you said that you acquired your property in May, 1945? A. Yes, sir.

Q. At the time you acquired your property the underpass under Denver Avenue had already been constructed, had it not? A. Yes, sir.

Q. And the ring levee had already been constructed? A. Yes, sir.

Q. At any time, Mr. Tillman, prior to when the ring levee failed on May 31st, 1948, had you ever made any protest to any representative of the United States about the condition of the underpass or the ring levee? A. No, sir. [9]

Mr. Lowry: That is all.

(Testimony of Mearl C. Tillman.)

Redirect Examination

By Mr. Phillips:

Q. Why did you not make any protest, Mr. Tillman?

A. At the time that it was constructed I didn't own property there, sir, and after 1945, why, I just hadn't made any complaint as to the strength of the circle, sir; that is, to the Government. I have talked to individuals, but not to the Government, sir.

Mr. Phillips: That is all.

Mr. Lowry: Thank you, Mr. Tillman.

(Witness excused.) [10]

F. R. SCHANCK

was produced as a witness in behalf of Plaintiffs, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Mr. Schanck, to what profession do you belong? A. Civil engineer.

Q. How long have you been a civil engineer?

A. More than 40 years.

Q. Where did you receive your schooling?

A. Stanford University.

Q. Are you a registered licensed civil engineer of the State of Oregon? A. Yes, sir.

Q. Have you had any particular experience with

(Testimony of F. R. Schanck.)

the building of dikes or dams or earthworks, and things of that kind and nature; and, if so, what?

A. Both dikes along rivers and canals, built of various materials, which require the same kind of analyses. I have built dikes along the Colorado River, Arizona, the Kansas River in Kansas, the Missouri River, the Yakima River in Washington, and at one time I was engaged by the Army Engineers here to advise them on the river protection work they were doing on the Willamette and the Santiam and a couple of rivers in Washington, and have had experience with the Navy during [11] this last war. I was engineer in the Bureau of Yards and Docks, which builds shore establishments, in Puerto Rico, the British West Indies, and the eastern United States. The matter of the use of materials to withstand water was one that I had to do with.

Q. Have you prior to this time made a study, Mr. Schanck, of the pre-trial order and the dimensions and construction of the Denver Avenue fill and the ring levee, together with the cut?

A. I have.

Q. Have you studied the elevations and the cross-sections? Have you made a study of that?

A. Yes, sir.

Q. Are you at this time acquainted with the construction of Denver Avenue and of the ring levee in May, 1948, and prior to that time?

A. I am, as described in that pre-trial order.

Q. Now, in your opinion, Mr. Schanck, what would the Denver Avenue fill do to prevent water

(Testimony of F. R. Schanck.)

from coming from the west to the east between Drainage District No. 1 and Drainage District No. 2? What would that act as?

A. It would act as a dike to prevent water flowing from the west to the east up to the limit of the height of the Denver Avenue fill.

Q. From the construction of that fill as it was at that time, [12] what would you say as to its ability to prevent floodwaters coming from the west to the east had it not been for the underpass that was cut there, as you know it?

A. The Denver Avenue fill should have withheld the maximum water that did occur during the flood of 1948.

Q. Now, in comparison with the Denver Avenue fill, what would you say as to the construction, the way it was constructed, the manner it was constructed, the height, the width and all that, of that ring levee in comparison with the Denver Avenue fill as a block to water coming from the west to the east?

A. The so-called ring levee I would not consider adequate to have withstood a flood even considerably lower than the one of 1948.

Q. For what reason? Why do you say that?

A. The material of which it was built was not one that readily consolidated with any cohesion to resist water. The slope of the bank, especially the east slope, was too steep to probably stand after it became saturated with water and the water acted

(Testimony of F. R. Schanck.)

as a lubricant to permit the material to slide. And then the form of the ring dike——

Q. What do you attribute to the form? Will you explain that, please.

A. The fact that there was a pocket in the underpass, where water coming from the west would acquire velocity as it flowed in to fill that further pocket, would cause a very much greater [13] erosion and would be very much more apt to erode than if it had been a straight continuation of the Denver Avenue fill, because the erosion, the eroding power of water, increases very rapidly, probably to the sixth power of velocity, so that the water instead of just being slowly rising against the face was flowing along the face of the ring dike, as it must have to have gotten in there. This erosion would have been very much greater, and therefore the ring dike should have been constructed more substantially than if it were a part of the straight Denver Avenue fill.

Q. The fact that that was formed in what we call a ring, would that in any way affect the erosion or the current of the water coming through the cut?

A. Yes. The pocket of the underpass formed as I said, the water had to flow in there, not just rise gradually, so that it would have a velocity along the face of the ring dike, and there would be a certain amount of turbulence which would greatly increase the erosion effect.

Q. Now, Mr. Schanck, I believe it is admitted and agreed that there was a clay blanket placed on

(Testimony of F. R. Schanck.)

the east side of this ring dike. Would that have any particular effect on any erosive power of the water coming from the west to the east in any way?

A. Not the comparatively thin blanket that was put on there. If it had been heavy enough to have acted as a dike all by [14] itself, it might have resisted, but that thin blanket would just fall in. The loose sand that the west face was built from would be carried away, and the clay blanket just would fall into the water, I assume.

Mr. Phillips: That is all.

Cross-Examination

By Mr. Lowry:

Q. Mr. Schanck, I gather from what you say that you have had some experience both with the design and the construction of levees?

A. Yes, sir.

Q. Would you say that the determination of the proper design and construction of a levee calls for the exercise of judgment on the part of the engineer? A. Yes, sir.

Q. And I take it there might be reasonable differences of opinion between competent engineers as to what in any given situation a proper design of a levee might be? A. Yes, within certain limits.

Q. I think you suggested in one of your answers that the Denver Avenue fill might be considered a dike. The fact is, is it not, that under the circumstances stated in the pretrial order there would be

(Testimony of F. R. Schanck.)

no water against the Denver Avenue fill in the absence of a failure of one of the primary levees? [15]

A. I don't know that I understand what you mean by "primary levees."

Q. By "primary levees" I am referring to levees which in the normal course of high water would have water against them. Now, in the normal course of high water Denver Avenue would have no water against it, would it?

A. You mean if no other dikes broke?

Q. That is right. A. I think not.

Q. So that Denver Avenue would act as a dike, if at all, only in the event there was a failure of some other levee? A. Yes.

Q. What has your experience, Mr. Schanck, been in connection with culverts through highway fills when water comes up against a highway fill and creates a considerable head? Do you understand my question?

A. I don't know what you are aiming at.

Q. Mr. Schanck, does the engineering profession recognize that if there is a culvert through some such structure as Denver Avenue that that sometimes is troublesome when water gets up against the fill?

A. It depends upon how the culvert is installed. A culvert installed with adequate collars and external surfaces to prevent water from following it through, it shouldn't be the cause of any trouble. That is, I mean the dike shouldn't [16] fail there, or

(Testimony of F. R. Schanck.)

the fill shouldn't fail there more than any other place.

Q. Is there anything in the pre-trial order that indicates that any such collars were installed around the culvert which was under Denver Avenue?

A. What culvert are you talking about?

The Court: Counsel, you are asking about the pre-trial order. You are probably better acquainted with it than the witness is.

Mr. Lowry: I will withdraw the question.

Q. When you suggested that Denver Avenue might serve as a dike, did you have in mind that it had a culvert roughly five feet by five feet through it? A. An open culvert?

Q. No, I think the culvert was plugged. I am only asking you what you had in mind when you answered the question.

A. I was considering the height and the width and the slopes of the Denver Avenue fill.

Q. And you did not give consideration to the culvert that runs through Denver Avenue?

A. No.

Q. Mr. Schanck, it is true, is it not, that when a fill or earthen embankment is exposed to water of a considerable height suddenly and without prior seasoning by other exposures to water the conditions are adverse from the point of view of the [17] strength of the embankment?

A. Yes, it should be built with that in mind, that it may be exposed suddenly.

Q. And of course, Denver Avenue, under the cir-

(Testimony of F. R. Schanck.)

cumstances which are assumed in the pre-trial order, was exposed to water very suddenly, was it not?

A. You mean it had never been exposed to water before? I think it had been.

Q. In answering the question that Counsel put to you as to whether or not Denver Avenue might be expected to act as a fill, as a satisfactory dike, did you assume that Denver Avenue had been exposed to water pressures on a number of occasions in the past? A. I didn't take that into account.

Q. Either one way or the other? A. No.

Q. But it is true, is it not, that a sudden exposure to a high head of water puts a severe strain upon an earthen embankment if it has not previously been exposed to water pressure?

A. You mean if it is not consolidated it is more apt to fail than if it is?

Q. No. What I have in mind is this: I understand that in normal levee construction and design work you anticipate that the water will come up against the levee gently as the river rises, and on numerous occasions very likely before you get [18] the maximum flood. Now, I also understand——

A. I never designed one that way.

Q. Let me see if I can just get an answer to my question. Would you consider that a levee which had never been exposed to water pressure before and received the pressure of water of a hydrostatic head of perhaps 20 feet, was being tested under severe conditions?

A. You mean under abnormal conditions?

(Testimony of F. R. Schanck.)

Q. Yes, conditions which are likely to put a severe strain upon the levee? A. Yes.

Q. In discussing the ring levee, you referred to the fact that it was composed of material which I think you suggested did not readily compact. You have in mind that it was built of sand in part?

A. That is what I understand was used.

Q. Sand is very frequently used in the construction of levees, is it not?

A. It depends upon certain circumstances. If it is available in adequate quantities and is of a suitable kind—sands have very different characteristics, both wet and dry.

Q. But sand is, generally speaking, frequently used in the construction of levees?

A. Yes. It is usually the most easily available.

Q. You spoke, Mr. Schanck, of an erosion problem because of [19] the fact that this levee was semicircular. Of course, that problem would not arise had the water come from the other direction, would it? That is, if the water had come from the east moving toward the west, there would have been no erosion problem?

A. There would have been a less amount along each of the faces as they went towards the Denver Avenue dike at right angles, as they approached the 90-degree angle from the axis of the Denver Avenue dike; not as much as there was here.

Q. Do you know anything about the circumstances under which the ring levee failed, Mr.

(Testimony of F. R. Schanck.)

Schanck? I don't mean to mislead you. What I really want to know is, do you have any way of saying whether or not erosion contributed to the failure that took place?

A. I would say almost surely that erosion did have something to do with it, because if there had been no current whatever against the face of that, there is just a bare possibility that it might have held. Now, erosion, of course, comes from any movement of water, either vertically or horizontally, and it is what usually starts the failure of any structure of that kind.

Q. By erosion you would mean in this case erosion of the inside surface of the ring levee?

A. Erosion where the water was, yes.

Q. You have no personal knowledge of the circumstances [20] under which that levee failed?

A. No. I wasn't there.

Q. So you don't know one way or the other whether there was any evidence at the time of the failure of any effect of erosion; that is, of your personal knowledge? A. No, I don't.

Q. What you have told me is that you are fairly confident from what you know about levees generally that that probably had an effect? A. Yes.

Mr. Lowry: That is all.

(Testimony of F. R. Schanck.)

Redirect Examination

By Mr. Phillips:

Q. Mr. Schanck, no matter what you call Denver Avenue—a dike, highway, or what not—it still would be a block and protection to District No. 2, to prevent water traveling from the west to the east, wouldn't it? A. Yes, sir.

Mr. Phillips: That is all.

(Witness excused.)

(Short recess.) [21]

THOMAS G. DONACA

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Where do you live, Mr. Donaca?

A. 444 Northwest Maywood Drive.

Q. Portland, Oregon? A. Yes, sir.

Q. How long have you lived in Oregon?

A. 60 years.

Q. You have been in varied businesses in Oregon since you have lived here?

A. Mostly the real estate business.

Q. Did you have any connection or official ca-

(Testimony of Thomas G. Donaca.)

pacity with Drainage Districts Nos. 1 and 2; and, if so, during what period of time?

A. I was supervisor of Peninsula Drainage District No. 2 since 1937, and a supervisor in Peninsula Drainage District No. 1 since 1938. And I think I was secretary of each of them for a while.

Q. Were you also a property owner in each district? A. In both districts.

Q. Now, in 1928, Mr. Donaca, I believe District No. 2 was reorganized; is that correct? [22]

A. That is my understanding.

Q. Under that reorganization was there any separation of the Districts and, if so, why?

A. It was my understanding that they separated Districts Nos. 1 and 2. I got that only from what the attorneys have told me and the engineer for the Districts. I never read the records myself.

Q. From your own experience, without any hearsay, when the two Districts were separated, what was the dividing line? A. Denver Avenue.

Q. At that separation, was there a change in the drainage system of each District?

A. Not at that time. There was a change later.

Q. When was that and what was it?

A. I think the actual change came about 1941.

Q. What was that change?

A. Previous to 1941, the water from both Districts drained to a pump in District No. 1. The U. S. Army Engineers raised the dikes on Peninsula No. 1, I think it was in 1940, and in 1941 they raised them in Peninsula No. 2. And at that time a pump

(Testimony of Thomas G. Donaca.)

was put in Peninsula Drainage District No. 2, a separate pump, and Peninsula Drainage District's water drained to the pump that was in Peninsula Drainage District No. 2.

Q. The only actual connection between the two Drainage Districts, then, as I understand it, was physically what? A culvert, [23] or something of that kind, with one pump?

A. There was a culvert under Denver Avenue previous to the time it was plugged.

Q. Were the two Districts ever joined or did they ever have any connection with each other otherwise than that physical connection?

A. Financially or physically, no.

Q. They were separate and distinct drainage districts? A. Separate districts.

Q. What was the dividing line—I believe you testified it was the Denver Avenue fill?

A. Denver Avenue.

Q. Was there any other western dike or protection from water coming from the west in Drainage District No. 2 than Denver Avenue?

A. Not for Peninsula Drainage District No. 2 itself, no.

Q. That was the western district. Now, what about the Union Avenue fill?

A. We never considered that a dike. It had a five-foot culvert through it which never was plugged. As a matter of fact, it had an underpass built by the State Highway Department, through Union Avenue.

(Testimony of Thomas G. Donaca.)

Q. Was that any protection from water coming from the west to your District, any part of your District?

A. No protection whatever, either way. [24]

Q. What would you say about Denver Avenue and the ring levee?

A. Why, I assumed that the ring levee was a protection.

Q. Did you have any other independent protection for your District No. 2? A. No.

Q. Were you present during 1948 when the ring levee gave way?

A. Not at the time it gave way.

Q. Were you there prior to that time?

A. Yes.

Q. Did you observe the situation there?

A. I did.

Q. Will you describe just what you saw and what happened?

A. Well, the water, of course, was as high, I think——

Q. First, may I interrupt you and ask you a question. Where did the water come from that came up against the ring levee? A. From the west.

Q. How did it get through Denver Avenue?

A. Broke the ring levee.

Q. How did it get through the Denver Avenue fill? How did the water get through the Denver Avenue fill? A. You mean the floodwater?

Q. Yes.

(Testimony of Thomas G. Donaca.)

A. The only way I know, it went through that levee.

Q. Was there an underpass there?

A. There was, yes. [25]

Q. Did you have anything to do with the water coming through Denver Avenue?

A. Well, that was where the dike broke.

Q. That is, the ring levee broke at the underpass?

A. That is right.

Q. Now, let's leave the ring levee out of it. Referring particularly and specially just to the Denver Avenue fill itself, how did the water get through there? A. I don't understand.

Q. You don't understand my question. Well, I will ask you this: Did the water come through the cut there at the underpass before it hit the ring levee? A. Oh, yes. That was open.

Q. That is what I thought. Now, did the water get through Denver Avenue anywhere else, or did you get any water that came from anywhere else onto Drainage District No. 2 except through that underpass and the ring levee?

A. Yes. The original culvert, I guess you would say, it broke out. The plug in the culvert broke out, and that was leaking very, very badly.

Q. What eventually happened to that?

A. They finally got that plugged by using——

Q. Was that before or after the ring levee broke?

A. That was before. There was some seepage through the dike, through Denver Avenue at the

(Testimony of Thomas G. Donaca.)

north end, but that never went [26] out. There was a pipe under the ring levee.

Q. Yes, I will come to that presently. Now, prior to the break, were you on the ring levee?

A. I was all around there, yes.

Q. Answer my question. Were you on the ring levee? A. Yes, I was on there.

Q. What did you observe as to a leak around a particular pipe or manhole? Just describe what you saw there and what happened.

A. I never knew there was a pipe under there.

Q. Where was it, then? Tell us that.

A. It was about, I would say, two-thirds of the way to the north end of the ring levee. At the time I saw it, Mr. Dibblee and I were standing there.

Q. Who? A. Mr. Ken Dibblee.

Q. Who is he?

A. A U. S. Army Engineer. And the thing just blew out, as far as I could see.

Q. What do you mean, the thing blew out?

A. I mean the water came up there in a geyser like. It was coming through the dike. I didn't know there was a pipe through there. It looked like it was coming right through the dike. We attempted to——

Q. Did you find out where the water was coming through, or what it was coming through? [27]

A. I never knew until after the flood it was a pipe. We attempted to plug it with—we attempted to block that water from coming through there with sandbags, but the geyser was so high, so strong, they would throw sandbags in there and they would just

(Testimony of Thomas G. Donaca.)
go out to one side. That was right at the foot of the dike, or the ring levee—the ring levee.

Q. Where was the water coming up in the geyser from?

A. On the inside of Peninsula Drainage District No. 2, and then later it was coming through this pipe. I didn't know at that time there was a pipe through there.

Q. Was there a manhole that had any connection with it there?

A. I never knew there was a manhole there until after the flood.

Q. Was there any water coming up through that?

A. That is the water that was coming through there I am trying to describe.

Q. If I get your testimony correctly, the water came through a pipe and up through the manhole in a geyser; is that correct?

A. That is right. The only thing I am trying to explain is that I didn't know whether it was coming through the pipe or coming through the dike at this time.

Q. You learned later that it was a pipe?

A. That is right.

Q. Now, it was coming from which direction?

A. Coming from the west to the east, from Peninsula No. 1 [28] to No. 2.

Q. And up through a manhole?

A. Yes. I found later it was, yes.

Q. I don't know whether I asked you this or not: Did you have or did you consider that you had any

(Testimony of Thomas G. Donaca.)

other protection save and except that Denver Avenue fill from the west for your Drainage District No. 2?

A. The Peninsula Drainage District itself had no other protection.

Q. Was there any other thing that you did or could have relied on to protect you from water coming from the west?

A. No, except hope that in the other District the dikes would hold. That is all.

Q. Did you ever protest about the building of this ring levee or the cutting of the underpass through Denver?

A. As Supervisor of the Drainage District I did.

Q. Did you personally?

A. I did personally.

Q. To whom did you protest?

A. Oh, there was a lot of discussion at that time over the thing with the Highway Department and the Army Engineers.

Q. Now, in so far as that ring levee was concerned, did you have any reason to doubt, prior to the time of the flood, but what that was a good protection to your District No. 2?

A. Well, I had understood that it was under the supervision [29] or with the approval of the U. S. Army Engineers, and if they approved it, approved the rest of the dike, I was satisfied.

Mr. Lowry: I move to strike that answer on the ground it is hearsay, your Honor.

(Testimony of Thomas G. Donaca.)

The Court: Stricken.

Mr. Phillips: I think that is all.

Cross-Examination

By Mr. Lowry:

Q. Mr. Donaca, I wonder if you could tell us in a little more detail what happened at the site of the culvert where the plug blew out. Were you present?

A. I was present there, yes.

Q. That was a large culvert?

A. I think it was a five-foot culvert, if I am not mistaken. Water was going through there, oh, in a big volume, and there was a very great effort to plug that place. They were throwing a lot of gravel in there, hauling straw, and they finally got quite a lot of metal airplane strips, or whatever they were, and threw those in there and threw gravel back on that. Part of the dike went out there.

Q. You are talking about Denver Avenue, itself, now?

A. I am talking now about Denver Avenue, itself.

Q. This culvert was 75 to 100 feet south of the Denver Avenue underpass? [30]

A. I think it is farther south than that.

Q. You give your opinion.

A. I would say it was five or six hundred feet south, anyway.

Q. So this culvert through Denver Avenue itself was not in any way connected with the underpass or the ring levee? A. None whatever.

(Testimony of Thomas G. Donaca.)

Q. Do I understand that Denver Avenue itself started to slough into the culvert because of the action of water going through the culvert? Did the banks begin to cave?

A. You are talking about the five-foot culvert?

Q. Yes, sir.

A. Yes, they caved on the west side where the water was coming from. It was cutting in there. I didn't see any caving on the east side or washing on the east side.

Q. This caving was substantial, was it?

A. Yes, it was very substantial.

Q. I take it if it had not been stopped, Denver Avenue itself would have failed right there?

A. I think that is right.

Q. Perhaps you could tell me about how long did the water flow through the culvert before the efforts to stop it were successful?

A. Well, it would only be an estimate. I would say several yards; five or six yards, anyway.

Q. Now, I think you mentioned some seepage through Denver Avenue, [31] itself, up toward the north end? A. That is right.

Q. Would you tell me in a little more detail about the seepage.

A. Well, it wasn't serious, as far as I could see, but the Highway Department had bulldozers there —I mean a crane or shovels there, and were putting more dirt along the side of the dike.

Q. Were they sandbagging the side of the dike, do you remember?

(Testimony of Thomas G. Donaca.)

A. I didn't notice any sandbagging there. That is, I don't remember it.

Q. I think you stated you were not present on the ring levee when it finally failed?

A. I was not.

Q. This gusher of water that you have been describing, how far out from the toe of the ring levee did that appear?

A. Well, it seemed to me very close. We tried to throw sandbags into it, and we couldn't have thrown those sandbags very far.

Q. A few feet, perhaps?

A. I would say a very few feet; maybe four or five feet.

Q. How long did that water flow before the ring levee failed, do you know?

A. No, I don't know. Quite a little while.

Q. Mr. Donaca, you said something about protests on account of [32] the construction of the Denver Avenue underpass. I would like to know what you did about that, personally, as opposed to what somebody else did.

A. Well, as Supervisor, we wrote a letter protesting it. I was at the meeting. I can't tell you exactly what I did. I remember that it disturbed us all for some time.

Q. Was this letter that you talk about addressed to the Oregon State Highway Department?

A. The Highway Department.

Q. Was this letter written by Mr. Phipps?

A. Yes, I think so.

(Testimony of Thomas G. Donaca.)

Q. You cannot now recall any more detail about this than you have already given me, about your own conduct in this connection?

A. No definite time. I remember at that time we were working with the Highway Department—or with the U. S. Army Engineers in both 1 and 2, and most everything that had to do with dikes in any way we took up with the U. S. Army Engineers.

Q. You are talking about what you did yourself?

A. Talking about what I did as a Supervisor and personally.

Q. Do you recall now with whom in the Army Engineers you discussed this problem?

A. Our discussions were usually with Mr. McKenzie, G. K. McKenzie. [33]

Q. Do you recall any specific conversation with Mr. McKenzie? A. I do not.

Q. Mr. Donaca, in connection with the protection which District No. 2 had from water coming from the west, it is true, is it not, that the effective protection provided to District No. 2 was the levees of District No. 1?

A. I don't think that people in Peninsula No. 2 considered the protection from No. 1 protected No. 2.

Q. I was just trying to find out about the physical fact, and that is that the floodwater was held away from District No. 2 as far as the western approach was concerned by the levees of Peninsula Drainage District No. 1, was it not?

A. It was held away from Denver Avenue; that is right.

(Testimony of Thomas G. Donaca.)

Q. So that in the absence of some failure of Peninsula Drainage District No. 1 levees there would not be any water against Denver Avenue?

A. That is right.

Q. Mr. Donaca, at the time of the flood were the representatives of Peninsula Drainage District No. 2 active in participating in the flood fight?

A. I was there from Thursday afternoon to Sunday night.

Q. Did the District do anything about the flood fight in addition to having you and your associates present?

A. Well, they did all they could, I guess.

Q. Did you furnish some equipment, for example, and some [34] material?

A. Lots of it.

Mr. Lowry: That is all.

Redirect Examination

By Mr. Phillips:

Q. Mr. Donaca, counsel asked you about the protection from District No. 1. Did District No. 2 have any control over District No. 1? If it saw fit to flood District No. 1 or cut their dikes, or anything, was there any way District No. 2 could have prevented that? A. None whatever.

Q. If they had done so, would you have had any protection whatsoever except Denver Avenue?

A. No.

Q. Mr. Donaca, you were speaking about this

(Testimony of Thomas G. Donaca.)

culvert. Do you know who plugged that culvert, that five-by-five culvert?

A. It was my understanding the contractors on each District plugged the end of the pipe in which District they were working.

Q. What contractors are you speaking about?

A. I didn't hear you.

Q. What contractors are you speaking about?

A. Well, the contract let by the U. S. Army Engineers to strengthen the dikes in Peninsula No. 1 and the contractor [35] who had the job on Peninsula No. 2.

Q. That is, the culvert you are speaking of that was effectively plugged, did water stop coming through there at the time of the flood that you described? A. That is right.

Q. That is not the pipe you were speaking of?

A. No, that is not the pipe.

Q. What kind of a pipe was that you were speaking about?

A. I found later it was a cast-iron pipe.

Q. About how big? Do you know how big it was? A. 16 or 18 inches.

Q. It went clear through the dike?

A. Yes.

Mr. Phillips: That is all.

Recross-Examination

By Mr. Lowry:

Q. Mr. Donaca, you said that you understood that the plugging of the Denver Avenue culvert was

(Testimony of Thomas G. Donaca.)

done by contractors working for the Army Engineers. Do you personally know anything about it?

A. No, I don't. I was told that.

Mr. Lowry: I move, your Honor, that the answer in that connection be stricken on the ground that the witness knows nothing about it. [36]

The Court: It has gone in. I am going to leave it there. Obviously, I won't give it any weight.

Mr. Lowry: All right, your Honor. May I just say, your Honor, that we have on our part no such information.

Mr. Hess: The only thing is we would like the record to show that we move to strike it on the ground that it is hearsay testimony.

The Court: I heard you.

Mr. Lowry: Thank you.

Mr. Phillips: Thank you, Mr. Donaca.

(Witness excused.) [37]

CLINTON S. McGILL

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Where do you live, Mr. McGill?

A. 7300 Northeast 33rd Drive.

Q. What business are you in?

A. Contractor, general contractor.

(Testimony of Clinton S. McGill.)

Q. Were you ever employed by the Portland Housing Authority? If so, when?

A. I was employed by the Portland Housing Authority from about 1943 until 1951.

Q. In what capacity?

A. Maintenance engineer.

Q. Who was your immediate superior?

A. Well, at what period of time?

Q. Just prior to the time of this 1948 flood.

A. Prior to the time of the '48 flood?

Q. Yes. A. That was Mr. Taylor.

Q. Were you acquainted with a man by the name of Mr. Peirson or with Mr. Byers?

A. I am.

Q. What positions did they hold? [38]

A. Mr. Byers was a maintenance engineer for the Portland Housing Authority up until about 1945, I think. From 1941 to 1945, or about that period.

Q. Who was Mr. Peirson?

A. Mr. A. A. Peirson was the regional engineer in charge of the construction and operation of this District under Mr. Crutsinger of Seattle.

Q. I didn't get that last.

A. He was regional engineer in charge of construction in this area under Mr. Crutsinger of Seattle.

Q. What organization was that?

A. Federal Public Housing Authority.

Q. In relation to your position was Mr. Peirson one of your superiors?

(Testimony of Clinton S. McGill.)

A. Previously he was. I worked for Mr. Peirson, and later I worked jointly for Mr. Peirson and the Portland Housing Authority, and then went over with the Portland Housing Authority.

Q. Did you have anything to do with the original construction of the ring dike or the ring levee or the underpass yourself? A. I did not.

Q. You came there after that time, did you?

A. That is right; yes, sir.

Q. Now, at any time prior to the time of this 1948 disaster did you personally make an inspection of that ring levee and dike? [39]

A. Yes.

Q. Just explain what you did in connection with that and when that was?

A. Well, it was probably, oh, two or three years —probably '45 or '46 the top of the dike started opening up with large cracks in several places around the top edge of the ring dike, because the erosion, the normal erosion, had caused the dirt to slide down, which was at a very steep slope on the east side of the ring dike.

Q. On which side?

A. The cracks were in the top. The slippage was on the east side of the ring dike.

Q. What, if anything, did you have to do with that, or what did you do about it?

A. Well, as I remember, Mr. Byers told me that he was going to find out if he could whether or not this dike was a standard dike.

(Testimony of Clinton S. McGill.)

Mr. Lowry: Your Honor, I move to strike that answer on the ground that it is hearsay.

Q. (By Mr. Phillips): Just tell us what you did about it.

The Court: Yes, the answer is stricken.

A. Well, Mr. Byers and I went down there and looked at the cracks in the dike, and so forth.

Q. What I want is, did you have anything personally to do with it? [40]

A. We repaired it eventually.

Q. What did you have personally to do with the repair of the dike?

A. Well, after the conversation we——

Q. What conversation? Who had the conversation?

A. Well, that was a conversation between Mr. Byers and Mr. Peirson about whether or not they would fix it.

Q. Then what part did you have in it? What you did personally is what we want; not what somebody told you.

A. We eventually dumped those cracks full of dirt and raked them over so they wouldn't be any hazard to anybody that walked around the top of the dike.

Q. Did you get any estimate for the doing of that work?

A. Yes, we had an estimate from Joplin & Elvon for repairing the dike proper and bringing it up to standard.

Q. Did you do that personally?

(Testimony of Clinton S. McGill.)

A. I personally did that.

Q. Was your idea and your plan carried out?

A. No, it wasn't.

Q. Why not? Who stopped that?

A. It was turned down by Mr. Peirson.

Q. By whom?

A. Mr. A. A. Peirson, the Regional Engineer.

Q. Did you talk with Mr. Peirson personally about that?

A. To some extent, yes; nothing official. [41]

Q. How about the repairs to the dike?

A. Yes. He made the remark to me——

Q. Now wait a minute. You said he was not talking officially. Was the dike repaired in compliance with your ideas and the estimate that you had gotten? A. It was not.

Q. What was the difference?

A. About eighty-five hundred or nine thousand dollars.

Q. No, I mean the repairs that you recommended and got bids for, what was the difference in that plan that you had and the plan that was followed eventually? Do I make myself clear?

A. Well, the dike was never brought up to standard. We merely filled the cracks and raked them over. That is all.

Q. What was your plan?

A. Well, you mean when I was requested to get the estimate for the repair of the dike?

Q. Yes. Did you do that?

(Testimony of Clinton S. McGill.)

A. I got an estimate on it, but the job was, as I say, turned down.

Q. Did you have any plan as to what was going to be done if you could get your estimate?

A. No. Mr. Byers handled that.

Q. So you don't know what they were going to do under your plan?

A. That is right. All I know was the conversation I heard [42] between Byers and one of the engineers that they would get a certain amount of fill dirt in there to bring it up to standard.

Q. Was it a part of your job to inspect this dike? A. Yes.

Q. Did you do so? A. Yes, we did.

Q. Do you know when or where that 18-inch pipe was put through the ring dike?

A. Well, I couldn't say as to the exact size of it. Are you referring to the one where the catch basin is drained through under the ring dike and the manhole?

Q. That is correct. A. Yes.

Q. Do you know where that was and what it was?

A. Yes, it was pretty well down towards the bridge in the ring dike.

Q. Can you tell us what that construction was, how it operated and how big that pipe was?

A. I couldn't tell you. It was quite a large pipe, say from 12 to 18 inches. It could have been 18 inches. I don't know.

Q. Did it have any floodgates on it?

(Testimony of Clinton S. McGill.)

A. I think—I don't remember. Honestly, I don't. I know it ran down to the manhole on the east side of the ring dike.

Q. Where did it start from? [43]

A. That took off a certain amount of surface water that came down the roadway going into the circle of Vanport.

Q. And drained into District No. 2?

A. That is right.

Q. You don't know whether it had any floodgates or not? A. I don't remember that.

Q. Were there any other systems or pipes or anything put along that ring dike or in that ring dike?

A. Well, we found out after the flood that there was one through there.

Q. Was there any water pipes put in there?

A. Yes. The water main to East Vanport ran over the top of the ring dike and through the underpass and down into East Vanport.

Q. You say the ring dike was repaired but not under the bid or the idea that you had. What was done to repair that ring dike?

A. As I say, all we did was to haul in dirt and fill the cracks to eliminate any hazard there.

Q. I believe you said that it was a hazard. What did you mean by that?

A. Well, these cracks, some of them, were pretty wide; six or eight inches wide.

Q. How wide would you say they were?

A. I would say some of them were six or eight

(Testimony of Clinton S. McGill.)

inches, maybe [44] more, and some of them were way down deep in the ground.

Q. How deep would you say?

A. Oh, six or eight feet; maybe ten feet. They were narrow wedge-shaped cracks.

Q. Were you there at the time of the flood?

A. Yes, sir.

Q. Were you around that ring dike prior to the flood, prior to the time that it broke?

A. Yes, I was.

Q. Where did the water come from that came through Denver Avenue?

A. It came from Vanport.

Q. How did it get through Denver Avenue?

A. It broke the ring dike between the bus loading station and about halfway south of that.

Q. Did you see anything in connection with the break in the ring dike yourself? Did you see the ring dike prior to the time it broke?

A. Yes, sir.

Q. Where did you see it?

A. I was on top of it about 20 minutes before it broke.

Q. In reference to this 18-inch pipe running from the east to the west, draining from the east to the west, what was occurring there at that pipe?

A. Inside the ring dike on the east side of the bridge, the [45] Denver Avenue Bridge, there was a very definite large swirl in there, and I don't think anybody could tell where it was—what was going on underneath at all. But the water was going

(Testimony of Clinton S. McGill.)

through at a terrific force, which got larger and larger.

Q. Going through where?

A. Outside the ring dike.

Q. That would be on the east side?

A. That is right.

Q. Was there any water coming through at that time anyplace else on the ring dike except there?

A. Not to my knowledge. Not to my knowledge.

Q. Did you see it?

A. I didn't see it anyplace else.

Q. Would you have seen it if it had been?

A. Yes, I would have.

Q. Then was it? A. There wasn't.

Q. Now, at that 18-inch pipe can you describe, please, what was occurring there. You say there was a swirl there and the water was coming out. Where was it coming out?

A. Coming out at the toe of the ring dike next to the manhole.

Q. Did you attempt to do anything about that?

A. Well, along in the evening there was so much water coming through there it was questionable whether anybody could do anything about it. [46]

Q. Did you try to do anything about it?

A. We did. That manhole was plugged with sand, if I remember right, prior to the trouble we had with this pipe. We plugged it full of hay and sand, to plug the manhole.

Q. That would be the manhole?

A. That is right.

(Testimony of Clinton S. McGill.)

Q. Did that hold? A. It did not.

Q. What happened to it?

A. Well, the pressure, as it got heavier and heavier, it finally blew out.

Q. Blew sideways or out the top?

A. Oh, that I wouldn't know.

Q. Do you know what happened, how it happened to blow out?

A. No, I couldn't tell you.

Q. Now, as to that five-by-five culvert that has been described through the ring dike, what occurred there? Can you describe what happened at that five-by-five culvert?

A. That is not through the ring dike.

Q. I meant through Denver Avenue. Pardon me.

A. That was about, oh, one hundred or so feet south of the south approach into Vanport of the ring dike. When that plug broke loose and the water started up through there, Mr. Sweeney, of Portland Meadows, brought over some baled hay to us, and those bales of hay were dropped into the swirl, and it plugged it [47] temporarily, and then they used airplane runway steel to cover it over, and then we used bank gravel and graveled over the top of that, and it held.

Q. Did that effectively block water from going through there?

A. Effectively sealed it off, yes, sir.

Q. Did it hold until such time as the ring dike went out? A. That is right.

(Testimony of Clinton S. McGill.)

Q. On Denver Avenue itself was there anyplace that looked to you as though it would give way prior to the time the ring dike did?

A. No, it was in very good condition.

Q. Did you get any water from anywhere except the ring dike; that is, floodwater?

A. Not very much.

Q. Of course, you described some water coming through——

A. Well, a little seepage here and there, but no water of any consequence.

Q. I will reframe my question. After you plugged that five-by-five culvert through Denver Avenue, then did you get any more water into No. 2 except through the ring dike?

A. Except through the ring dike. That is right.

Q. Prior to the time of the flood in '48 there, what was the condition of the east side as to the slope of that ring dike, and what did it look like?

A. Well, from about the center of the ring dike around to the [48] north side, as it swung around to the north side, to the bus depot station there, it was very steep. And the further around you went the steeper it became.

Q. Did you yourself call this condition to anybody's attention, either in writing or otherwise?

A. No. Mr. Don Byers handled that. The engineer who came down and checked it, he could well see that it wasn't up to standard. And he is the one that handled it from there.

Q. What engineer was that?

(Testimony of Clinton S. McGill.)

A. You mean who Don Byers talked to?

Q. From Seattle.

A. Well, the engineer that they had the conversation with was Mr. Peirson.

Q. Now, this water that came through the pipe, what effect did that have on the base of the ring dike? A. On the face of the ring dike?

Q. On the base; the bottom.

A. Oh, naturally it weakened it.

Q. Did it wash it at all?

A. Well, it must have, because it went out there.

Q. Is that where the break came?

A. That is right.

Q. Through the ring dike?

A. That is right.

Q. At that pipe? [49] A. That is right.

Mr. Phillips: I think that is all.

Cross-Examination

By Mr. Lowry:

Q. Mr. McGill, were you present when the ring levee failed?

A. No. I just had gone home to—I left the Denver ring dike and had driven from there to 24th and Ainsworth, and just as I walked in the door they called me on the telephone and told me the dike had broken.

Q. So you do not of your own knowledge know where it failed?

A. Only I came right back down there and

(Testimony of Clinton S. McGill.)

could see the cut before it widened out very much, where it had broken.

Q. About how long was that?

A. I was back there in probably 15 minutes.

Q. Well, there was quite a lot of water there then, wasn't there?

A. There were a lot of buildings going through there, too.

Q. So it was widening out pretty fast?

A. You could hear the buildings crushing out many blocks as they went through there.

Q. Now, this water main that you described running over to East Vanport, that of course did not go through the ring levee; it went up over it?

A. It was about four feet deep in the top of the ring levee [50] from the circle in Vanport. That is where they obtained their water from for East Vanport.

Q. Just to fix this precisely, the water main went through the ring levee about four feet from the top?

A. About four feet deep there; that is right.

Q. No trouble developed up there that you know of?

A. That is where it went out, right below the bus station. The water went through just south of the bus station and over and down the side into East Vanport, and that whole section went out there from that point south.

Q. This culvert that you spoke of which ran from the inside, so to speak, of the ring levee out

(Testimony of Clinton S. McGill.)

toward the toe, do you happen to know why that culvert was there? A. No, I don't.

Q. You don't know whether it was to drain that area inside the ring levee or not?

A. What is that?

Q. You just plain don't know? You don't know why it was there?

A. Well, yes, apparently it was there for drainage purposes.

Q. This inspection that you talked about of the ring levee in '45 and '46, I take it as you sit here now you are not absolutely certain what the date was? A. No, I don't remember.

Q. That was the inspection that was made with Don Byers? [51]

A. That is right. It was around '45 or '46.

Q. Did you personally repair that ring levee?

A. Yes, we had the——

Q. I mean you personally.

A. No, no; not personally. We had it done.

Q. So all you know about that is what reports were made to you?

A. No, I was down there at the time they were filling it.

Q. What were they doing at the time you were there?

A. Well, we had some small dump trucks, and we backed them in—it was wide enough to back in on top of the dike, and we dumped the dump trucks and raked those cracks full of dirt.

Q. About how long were you there?

(Testimony of Clinton S. McGill.)

A. Oh, probably Dick Forrest and I were down there a half-hour.

Q. I take it they were working on the ring levee for some days?

A. Oh, no. It didn't take very long to fill those cracks; probably less than a day.

Q. That is all you saw them do, was during that half-hour?

A. That is all we were there, yes, to my knowledge.

Q. Now, the discussion about the repair work that was to be undertaken at the ring levee, as far as you know about it, was between Mr. Byers and Mr. Peirson; is that right?

A. That is right. [52]

Q. And you did not personally participate in that discussion?

A. No. I was there during one of the discussions.

Q. You of course don't know who else, if anyone, considered the question of what repair work should be done on the ring levee? I mean you don't know to whom Mr. Peirson talked in addition to Mr. Byers?

A. No, I don't. It was between Mr. Byers and Mr. Peirson.

Mr. Lowry: I guess that is all.

(Testimony of Clinton S. McGill.)

Redirect Examination

By Mr. Phillips:

Q. Did you yourself talk to any of the Army Engineers concerning the repairs?

A. I did not.

Mr. Phillips: That is all.

(Witness excused.)

(Whereupon an adjournment was taken until Wednesday, August 5, 1953, at 10:00 o'clock a.m.) [53]

Wednesday, August 5, 1953

(Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows):

Mr. Phillips: Call Mr. Zeidlhack.

FELIX ZEIDLHACK

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. To what profession do you belong, Mr. Zeidlhack? A. I am a civil engineer.

Q. How long have you been a civil engineer?

(Testimony of Felix Zeidlhack.)

A. Over 40 years.

Q. Are you a registered civil engineer and licensed in the State of Oregon? A. Yes.

Q. With what firm or with whom are you connected?

A. I am a partner of John W. Cunningham, in the firm of John W. Cunningham and Associates.

Q. Have you made a study of this Denver Avenue fill and the ring levee involved in this case?

A. Yes, sir.

Q. You have been here all the time and you have heard the [54] testimony, also? A. Yes, sir.

Q. As to why it was constructed?

A. Yes, sir.

Q. Now, Mr. Zeidlhack, in reference to the Denver Avenue fill what is your opinion as to the ability of the Denver Avenue fill to have prevented water flowing from west to east at the time of this flood?

A. I think it would have been effective, yes.

Q. What effect did cutting that underpass have on the Denver Avenue fill's ability to hold back water?

A. It would nullify the effect of the dike.

Q. Now, the ring dike, do you know about that, also? A. Yes, sir.

Q. From your same experience? A. Yes.

Q. What would you say as to whether or not that ring dike was adequate to hold back water or, in comparison with Denver Avenue, would give the same protection from water coming from the west?

(Testimony of Felix Zeidlhack.)

A. I would say it would not be adequate protection.

Q. Why do you say that, Mr. Zeidlhack?

A. Due to the deficient slopes on both sides.

Q. What would you say as to the width and height?

A. The width at certain places was likewise insufficient. [55]

Q. Would building it in a semi-circle, the way it was, have any particular effect on it as to its adequacy as a dike? A. It would create currents.

Q. What would that do?

A. Have a tendency to erode.

Q. More so than if the water came up gradually on it? A. That is correct.

Mr. Phillips: Take the witness.

Cross-Examination

By Mr. Lowry:

Q. Mr. Zeidlhack, have you had some experience in connection with the design and construction of levees?

A. Those particular structures, none whatever.

Q. I was thinking or talking about your experience generally?

A. Oh, yes, yes. We build earth-filled dams and dikes.

Q. Would you say that the problems of the design of a levee are problems which require the exercise of judgment? A. Absolutely.

(Testimony of Felix Zeidlhack.)

Q. Would you say that the problems relating to the construction of a levee call for the exercise of judgment? A. Yes, sir; absolutely.

Q. I think you said that you have no personal familiarity with the levees and dikes which are under discussion here?

A. During the construction I had nothing to do with it. [56]

Q. Were you present at the time that the ring levee failed? A. No.

Q. In your experience, Mr. Zeidlhack, is it true that culverts through a highway fill frequently cause trouble if water comes up against the highway fill?

A. Not if they are properly designed.

Q. That is, not if they are designed to withstand the pressure of water? A. That is correct.

Q. But if the culvert had only been placed there for drainage purposes and had later been plugged in order to stop the drainage, would you think there would be some possibility then that the culvert might cause trouble?

A. If the plug is effective, I see no reason why it should, and if the culvert is properly designed.

Q. There is a difference, is there not, between designing a culvert from the point of view of providing drainage through a fill and designing it from the point of view of resisting hydrostatic pressure?

A. Yes, it would be designed differently.

Q. And a culvert designed only from the point of view of providing drainage through a fill might

(Testimony of Felix Zeidlhack.)

possibly be troublesome if hydrostatic pressure developed against it?

A. If it is improperly designed.

Mr. Lowry: I think that is all. [57]

Mr. Phillips: That is all.

(Witness excused.)

Mr. Phillips: That is the plaintiffs' case, your Honor. We rest.

Mr. Lowry: We are ready to proceed with the Government's witnesses, your Honor. [58]

KENNETH R. DIBBLEE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. By whom are you employed, Mr. Dibblee?

A. By the Corps of Engineers, Portland District.

Q. Are you an engineer?

A. I am a graduate civil engineer.

Q. How long have you been doing engineering work?

A. I graduated in 1927, and with the exception of one year I have followed civil engineering during all that time to date.

Q. About how long have you been working for the Corps?

(Testimony of Kenneth R. Dibblee.)

A. I have worked for the Corps continuously since 1936, and I had approximately one year previous to that time in '34.

Q. About how many years of experience have you had in connection with problems relating to levees in one fashion or another?

A. Approximately six and a half years.

Q. About how long have you been familiar with the levees of Peninsula Drainage Districts Nos. 1 and 2? A. Since 1936.

Q. Mr. Dibblee, do you have any personal knowledge about the construction or maintenance of Denver Avenue? A. No. [59]

Q. Do you have any personal knowledge about the construction or maintenance of the ring levee?

A. No.

Q. Were you on Denver Avenue on May 30th, 1948? A. Yes.

Q. Did some trouble develop at the site of the culvert south of the Denver Avenue underpass?

A. Yes, it did.

Q. Would you tell us generally what happened there.

A. Shortly after the failing of the Peninsula Drainage District No. 1 area the plug in this large culvert blew out, and with a considerable head of water against this culvert a large discharge passed through the culvert into Peninsula Drainage District No. 2. Efforts were immediately made by the local interests, and supplemented by the Oregon State Highway Department people, to attempt to

(Testimony of Kenneth R. Dibblee.)

plug the culvert. They worked by throwing bales of hay into the water on the westerly side, hoping the bales would be caught in the culvert. They dumped truckloads of gravel and material, and they worked through the afternoon and evening of May 30th and through until the late afternoon, I believe, of May 31, before they were successful in plugging that culvert. They ultimately did by using some airport steel matting and throwing that out, and with that and other materials they finally accomplished the stoppage of the flow.

Q. By the time the culvert had been plugged and the flow [60] stopped had any part of the fill washed away?

A. Yes, there had been sloughs on the westerly shore immediately above the culvert back into the pavement, even. It sloughed off—the shoulders had sloughed off into the water.

Q. Were you on the ring levee on May 30th, 1948? A. Yes.

Q. Did you see some water gushing out near the eastern toe of the ring levee? A. Yes.

Q. About how far from the toe of the levee was this water gushing from?

A. I estimated it to be between 15 and 20 feet from the toe of the ring levee.

Q. Could you describe for us about how much water was coming out and what it looked like?

A. Well, it appeared from observation at that time that there was a column of water approxi-

(Testimony of Kenneth R. Dibblee.)

mately two feet in diameter, a vertical column of water, that was gushing up from the ground, spilling over and running off into Peninsula Drainage District No. 2.

Q. Was the water running back toward the toe of the levee or away from it?

A. It was not washing against the toe of the ring levee. It was flowing in the other direction, more toward the center of Peninsula Drainage District No. 2. [61]

Q. As far as you could see, was that water having any effect on the ring levee? A. No.

Q. Was there any indication that the water was carrying any material out of the ring levee?

A. No.

Q. At the time you were on the ring levee on May 30th, 1948, did you see any current in the water adjacent to the western side of the ring levee? A. No, I did not.

Q. Did you see any evidence of erosion on the western side of the ring levee? A. No, sir.

Q. Mr. Dibblee, about how long did Denver Avenue hold after the water went up against it?

A. Well, my recollection is that the break in the railroad embankment which allowed the Vanport area to fill up occurred at approximately 4:30 p.m., on the 30th, May 30th, and that the break in the ring levee occurred at about 9:00 o'clock on May 31st.

Q. Then about how long did Union Avenue hold after the water reached Union?

(Testimony of Kenneth R. Dibblee.)

A. My recollection is that Union Avenue broke about 1:00 a.m., on June 1, which would have been about four hours after Denver Avenue broke, or the ring levee on Denver Avenue. [62]

Q. And Denver Avenue failed somewhere along about 9:30 or 10:00 in the evening of May 31st?

A. That is correct.

Mr. Lowry: You may examine.

Cross-Examination

By Mr. Phillips:

Q. Where did the ring levee break, Mr. Dibblee?

A. I wasn't there when the ring levee broke, sir. I was there earlier.

Q. Did you ascertain later where it broke?

A. Pardon?

Q. Did you find out later where it broke?

A. No, I didn't. I just went on to other flood-fight duties.

Q. You never did know, then, where the ring levee broke? A. Not exactly, no.

Q. You didn't know that it broke right there where you saw the water coming up? A. No.

Mr. Lowry: I object to that, your Honor. That is assuming a state of facts that is not in evidence.

The Court: Oh, no. That is proper cross-examination. He says he doesn't know where it was. That covers all the situations, I guess.

Q. (By Mr. Phillips): In so far as Denver Avenue itself is [63] concerned, after the five-by-

(Testimony of Kenneth R. Dibblee.)

five culvert was plugged that held then and that didn't break through there at all, did it?

A. No, the history of the case was the ring levee broke.

Q. Counsel asked you how long Denver Avenue held. As a matter of fact, Denver Avenue never did go out; it was the ring levee. Isn't that true?

A. Yes.

Q. So when you made your answer it was the ring levee you were talking about that gave way and not Denver Avenue?

A. Yes, sir; that is right.

Q. That is true, isn't it?

A. That is correct.

Q. Now, in so far as the five-by-five culvert that was successfully plugged is concerned, that didn't cause the flood that was caused by the breaking of the ring levee, did it?

A. No. It was plugged.

Q. Now, in so far as Union Avenue was concerned, Union Avenue had underpasses cut through it and a culvert through it, didn't it?

A. I didn't understand your question.

Q. You spoke about Union Avenue?

A. Yes.

Q. As a matter of fact, Union Avenue had underpasses and a culvert through it, didn't it?

A. It had one underpass on the northerly end which had been [64] plugged with sandbags. It had two culverts through it, one of which had a gate on it and the other one was an open culvert. Both of

(Testimony of Kenneth R. Dibblee.)

those culverts had been plugged with sandbags prior to the failure of the westerly half of the Pen. 2 District—prior to the break in the ring levee, even.

Q. That was done after the water started in through onto District No. 2? A. No.

Q. When was that plugging done?

A. That would have been done—I think the plugging of those culverts was accomplished along about 2:00 o'clock on the afternoon of the 30th.

Q. That was while the water was coming in on No. 1, wasn't it? A. No.

Q. Isn't that right?

A. I beg your pardon. I am getting mixed up on my dates. I should say that I think it was on the 31st that the water was against the ring levee. Let me put it that way. The water was against the ring levee, and on the 31st, prior to the break of the ring levee, about 2:00 o'clock in the afternoon on the 31st, those two culverts had been plugged and the underpass had been plugged.

Mr. Phillips: I think that is all, your Honor.

Mr. Lowry: That is all, your Honor.

(Witness excused.) [65]

HARRY K. DOYLE

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Doyle?

A. 626 Northeast 16th, Portland, Oregon.

Q. Are you employed by the Corps of Engineers? A. I am.

Q. What is your position?

A. Chief of Operations and Maintenance branch, Portland District.

Q. Were you employed by the Corps of Engineers in May and June, 1948? A. I was.

Q. About how many years have you been employed by the Corps of Engineers? A. 41.

Q. In general what sort of work have you done for the Corps?

A. Construction of levees, sea walls, bank abutments, maintenance of flood control dams and reservoirs, and the dredging of rivers and harbors.

Q. About how many years of experience have you had in connection with work on levees and levee problems?

A. Generally throughout the 41 years. [66]

Q. Have you had some experience in the actual conduct of flood fights, Mr. Doyle?

A. Yes, I have.

Q. Have you had some experience on the Mississippi River levees?

(Testimony of Harry K. Doyle.)

A. For a period of 25 years.

Q. Did you participate in flood fights on that river? A. A great many.

Q. Mr. Doyle, do you have any personal knowledge of the construction or maintenance of Denver Avenue? A. No, I do not.

Q. Do you have any personal knowledge about the construction or maintenance of the ring levee?

A. I do not.

Q. Were you present on Denver Avenue on May 31st, 1948? A. I was.

Q. Did you take any part in the flood fight which was conducted out there on that day?

A. I was assigned as an observer of the Columbia River flood and in all the Districts on the Columbia River.

Q. Did representatives of the Oregon State Highway Commission participate in the flood fight along Denver Avenue?

A. They did. I saw Mr. Baldock there.

Q. Who was Mr. Baldock?

A. Mr. Baldock was the Chief State [67] Engineer.

Q. For the Oregon State Highway Commission?

A. That is right.

Q. Were crews from the Oregon State Highway Commission working in connection with that flood fight? A. They were.

Q. Did the Highway Commission have some equipment out there? A. They did.

Q. Did trouble develop, Mr. Doyle, at the site

(Testimony of Harry K. Doyle.)

of the culvert underlying Denver Avenue south of the ring levee?

A. Yes. I observed the Highway force working on this culvert attempting to stop it, stop the flow of water into the east section.

Q. Mr. Doyle, from your observation, if the effort to plug the culvert had not been successful, would Denver Avenue have failed at that location?

A. I think it would have.

Q. Were there other trouble spots along Denver Avenue on May 30th and May 31st?

A. There was one in particular on the north end of Denver Avenue where there was a great deal of sloughing on the Vanport side, Pen. 1, and seepage on the Pen. 2 side where the Highway forces were very actively engaged in repairing sloughing on the Vanport side and sandbagging the Pen. 2 side. And at the time that I was there I was very much concerned that we might have a failure at that location. [68]

Q. Assuming, Mr. Doyle, that the ring levee had not failed, what is your best judgment as to whether Denver Avenue itself would have been able to withstand pressure of the floodwater?

A. I don't think so.

Q. Mr. Doyle, were you on the ring levee on May 30th or May 31st before it failed?

A. I wasn't on the ring levee, but I was right in the vicinity of the ring levee on the 31st in the afternoon.

Q. Did you see some water gushing out from the

(Testimony of Harry K. Doyle.)

toe of the ring levee on Peninsula Drainage District No. 2 side? A. I did.

Q. About how far from the toe of the levee was this water coming out?

A. Well, from my observation, which was just above the ring levee on the Pen. 2 side, it appeared to be about 15 feet from the toe.

Q. Was the water flowing back toward the levee or out toward the District?

A. No, it was flowing over towards the racetrack.

Q. Over towards what?

A. Towards the racetrack, east.

Q. It was flowing east? A. East.

Q. As far as you could see, was this water having any effect upon the ring levee? [69]

A. I didn't think so, no.

Q. As far as you could see, was the water carrying any material from the ring levee?

A. No.

Q. Did you see any current in the water adjacent to the western side of the ring levee?

A. No. It was just a pool steadily rising.

Q. Did you see any evidence of any erosion of the western side of the ring levee?

A. None whatever.

Q. About how long have you been familiar with the levees around Peninsula Drainage Districts Nos. 1 and 2? A. Since about 1941.

Q. At any time prior to May 30th, 1948, did you

(Testimony of Harry K. Doyle.)

see any reason to expect any of the primary levees to fail? A. No, I did not.

Mr. Lowry: That is all.

Cross-Examination

By Mr. Phillips:

Q. What are you speaking of when you say "primary levees"?

A. The control levees, the front levees that the river rises against.

Q. Would you tell us which levees those are, referring to District No. 2? [70]

A. I didn't understand you.

Q. Would you tell us which levees those are, particularly referring to Drainage District No. 2?

A. The levees along the Columbia River front and the Columbia Slough in the rear.

Q. What about the eastern levee?

A. On the east it would be a continuation of the Columbia River Slough.

Q. Will you tell us which levees you are referring to in District No. 1?

A. The Columbia River front levee, the Columbia Slough levee, and the railroad fill.

Q. That would be the west and the east levee?

A. North and south and western.

Q. Where did the ring levee dike break, do you know? Where did that levee break?

A. I don't know. I wasn't there.

Q. Denver Avenue did hold, didn't it?

(Testimony of Harry K. Doyle.)

A. Denver Avenue held, yes.

Mr. Phillips: That is all.

Mr. Lowry: That is all.

(Witness excused.)

The Court: We will take a short recess.

(Short recess.) [71]

THOMAS A. MIDDLEBROOKS

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Middlebrooks?

A. Alexandria, Virginia.

Q. Are you employed by the Corps of Engineers? A. Yes, sir.

Q. What is your position?

A. Chief of the Soils Branch in the Office of the Chief of Engineers.

Q. Where do you have your office?

A. Gravelly Point, Virginia.

Q. That is near Washington?

A. Washington, D. C.

Q. What, in general, are your duties?

A. I am responsible for the design, construction and proper operation of levees, plus flood control projects, the foundations relating thereto—anything

(Testimony of Thomas A. Middlebrooks.)

built or constructed of earth or on earth, earth dams, levees, and structures relating thereto.

Q. Does your responsibility extend to all or a large share of the work done by the Corps of Engineers in connection with levee structures?

A. All work by the Corps of Engineers, civil works. [72]

Q. Have you had some professional education as an engineer?

A. Yes, sir. I am a graduate of the Georgia Institute of Technology, with a degree in civil engineering, and had post-graduate work at the Massachusetts Institute of Technology in Soils Mechanics.

Q. Would you summarize briefly your employment since you left school?

A. On graduating from Georgia Tech in 1928 I spent a year on the Lower Mississippi on levee construction; returned to the M.I.T. for post-graduate work, and after that returned to the Mississippi levee construction work through 1933. From 1933 to 1937 I was on the construction of the Fort Peck Dam in Montana. From 1937 to date, Chief of the Soils Branch.

Q. Would you tell us briefly what experience you have had in connection with the design of earth dams?

A. Well, starting in 1937 and since then I have worked on the design and construction of all the earth dams that the Corps of Engineers has built.

Q. About how many dams have you had some connection with?

(Testimony of Thomas A. Middlebrooks.)

A. Oh, I would say those in process of design as well as those being built and already constructed, close to 100.

Q. Have you had some experience in connection with the construction of earth fills other than levees and dams?

A. Yes; railroads, highways and relocations connected with our projects. [73]

Q. Have you had some experience in connection with the design of levees?

A. Yes. My entire professional experience, except for the years at Fort Peck, has related directly to levee design and construction.

Q. Approximately how many miles of levee have you approved or reviewed or designed?

A. Oh, I would say somewhere close to 1,500 miles.

Q. With what levee systems in the United States are you generally familiar, Mr. Middlebrooks?

A. First, with the Lower Mississippi, where I started my work with the Corps, the Arkansas, the Red, the Kansas and Missouri Rivers, the Columbia, Sacramento, and San Joaquin Valley.

Q. Have you had some experience in the actual conduct of flood fights? A. Yes, sir.

Q. Has your work included studies of the properties of soils? A. Yes.

Q. Have you done some laboratory work in that connection? A. Yes, sir.

Q. Do you belong to some technical societies?

(Testimony of Thomas A. Middlebrooks.)

A. Yes; the American Society of Civil Engineers, and the Society of Military Engineers.

Q. Have you held positions with any of those societies? [74] A. Yes.

Q. Have you done some writing on engineering subjects?

A. Yes; several papers on various subjects relating to the design of earth structures to hold back water.

Q. Mr. Middlebrooks, is it customary practice in connection with the construction of levee systems to build secondary levees to provide protection in the event the primary levees fail?

A. No, it is not.

Q. To your knowledge, have any such secondary levees been built by the Corps of Engineers?

A. No.

Q. If funds are available for levee construction work, are those funds, in your opinion, spent to the best advantage on primary or secondary levees?

A. They are spent to the best advantage by strengthening the primary levees.

Q. Have you ever recommended the construction of secondary levees to provide protection in the event of failure of the primary levees?

A. No.

Q. Do you know of any standards or specifications for the design or construction of such secondary levees? A. I do not.

Q. Do adjacent drainage districts, in your experience, always [75] have levees between them?

(Testimony of Thomas A. Middlebrooks.)

A. Very seldom do they have any levees. In a recent case that I had, St. Louis, the Upper Mississippi Valley, five districts were included in one levee system.

Q. Did these districts have any flood protection structures between them at all? A. No.

Q. Are you familiar with Paragraphs 1 to 15, inclusive, of the Agreed Statement of Facts on file in this case? A. Yes.

Q. Assuming a system of primary levees and embankments as there described, was there in your opinion any reason to believe that any of the primary levees or embankments would fail structurally? A. No.

Q. What types of failure are considered structural failures?

A. Under-seepage, flowing out from underneath, uncontrolled seepage, sloughing of the levee, land side or river side—all failures except overtopping.

Q. That is, all failures other than overtopping are considered structural failures? A. Yes.

Q. Now, assuming a system of primary levees and embankments as described in the Agreed Statement of Facts, would you have recommended the construction of secondary levees to provide protection in the event of structural failure of the [76] primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, would you have recommended the construction of a secondary levee at the site of Denver Avenue to provide protection in the event

(Testimony of Thomas A. Middlebrooks.)
of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, and assuming an underpass through Denver Avenue, would you have recommended the construction of a ring levee around the underpass to provide protection in the event of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage District No. 1 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 2 were not so overtopped?

A. No.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage District No. 2 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 1 were not so overtopped?

A. Yes.

Q. Assuming the levee elevations described in the Agreed Statement [77] of Facts, and assuming that a ring levee was to be constructed around Denver Avenue underpass, what was the risk, in your opinion, which the ring levee should have been designed to protect against?

A. Against overtopping of District No. 2, because the levees were lower.

Q. Are you familiar with Paragraph No. 12 of the Agreed Statement of Facts on file in this action

(Testimony of Thomas A. Middlebrooks.)
describing the ring levee constructed around Denver Avenue underpass? A. Yes.

Q. In your opinion was the ring levee designed to protect against a particular risk?

A. Yes; it was designed to protect against water from District No. 2.

Q. Is that on the assumption that those levees would be first overtopped?

A. Would be first overtopped.

Q. What are the facts about the ring levee which in your opinion show that it was designed to protect against the risk that Peninsula District No. 2 levees would be overtopped?

A. The fact that it had a clay blanket on the side of the levee, on the District No. 2 side.

Q. Under all the circumstances described in the Agreed Statement of Facts was it, in your opinion, an exercise of due care and good engineering practice to design a ring levee to protect [78] against the risk that Peninsula Drainage District No. 2 levees would be overtopped? A. Yes.

Q. Under all the circumstances described in the Agreed Statement of Facts, and assuming that a ring levee was to be constructed around the Denver Avenue underpass, would you personally have designed that levee to protect against the risk that the Peninsula Drainage District No. 2 levees would be overtopped? A. Yes.

Q. Under all the circumstances described in the Agreed Statement of Facts, and assuming a ring levee was to be constructed around Denver Avenue

(Testimony of Thomas A. Middlebrooks.)

underpass, would you personally have designed that levee to protect against the risk of structural failure of any of the primary levees? A. No.

Q. Are you familiar with Paragraph 13 of the Agreed Statement of Facts on file in this case describing the repair work which was done on the ring levee? A. Yes.

Q. Was that repair work, in your opinion, adequate to bring the levee back to its original condition? A. Yes.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming the inundation of Peninsula Drainage District No. 1 by floodwaters reaching a [79] height of 32.4 feet M.S.L., would you have expected the Denver Avenue fill itself to withstand the pressure of the floodwaters indefinitely?

A. No.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming floodwater moving to the ring levee from the west, would you have expected any erosion of the ring levee?

A. No, I would not, since it was back in a pocket.

Q. Now, assuming a system of levees and embankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from the east?

(Testimony of Thomas A. Middlebrooks.)

A. I would consider it comparable to Denver Avenue in protection.

Q. That is, on water coming from Peninsula Drainage District No. 2?

A. Yes, from that side, where you have the clay blanket, I would consider it somewhat superior to Denver Avenue in protection.

Q. Now, assuming a system of levees and embankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from the west; that is, [80] from Peninsula Drainage District No. 1?

A. I would consider it equal to Denver in adequacy.

Mr. Lowry: You may examine.

Cross-Examination

By Mr. Phillips:

Q. When the ring levee went out, was that what you would call a structural failure?

A. Yes, sir.

Q. That was a structural failure of the ring levee? A. Yes.

Q. Now, you say the ring levee was built there to protect District No. 1 from water coming from District No. 2. Is that correct?

A. That appears to be the fact from the way the levee was designed.

Q. You have studied it? A. Yes.

(Testimony of Thomas A. Middlebrooks.)

Q. In connection with your ring levee, what else protected District No. 1 from water coming from District No. 2 except your little ring levee there?

A. Denver Avenue.

Q. You would say Denver Avenue is a protection from water?

A. Some protection, some temporary protection.

Q. As much as your ring levee? [81]

A. Yes.

Q. Now, as a matter of fact, Denver Avenue and your ring levee was the only protection that No. 1 had from water coming from No. 2; isn't that correct? A. Yes, I think that is correct.

Q. And, vice versa, the only protection No. 2 had from water coming from No. 1 was the same thing, wasn't it?

A. After it had gotten into No. 1, yes.

Q. Pardon?

A. After it had gotten into No. 1, yes.

Mr. Phillips: That is not the question I asked you. Will you read it?

(Last question read.)

A. Yes.

Q. I believe you said that the ring levee was constructed for the purpose of stopping the water coming from an overtopping of District No. 2; is that correct?

A. That appears to be the case from the facts presented.

Q. As a matter of fact, there was no overtopping on either No. 1 or No. 2, was there?

(Testimony of Thomas A. Middlebrooks.)

A. No, but the potential was there in No. 2.

Q. But, as a matter of fact, neither one of them was overtopped by that flood; isn't that correct?

A. No, not as far as I know.

Q. Insofar as the other levees which were concerned, they [82] all held with the exception of your ring levee down to the west there, on the west levee of No. 1; isn't that right?

A. I think the Statement of Facts bears that out.

Q. Pardon?

A. I think the Statement of Facts bears that out.

Q. I believe you said that in your opinion the ring levee as constructed would have given No. 1 as much protection from water coming from No. 2 as the Denver Avenue fill? A. Yes, somewhat.

Q. Is the converse true on that? Would the ring levee give as much protection from water coming from No. 1 as Denver Avenue?

A. Comparable to Denver Avenue, yes.

Q. Pardon?

A. Comparable to Denver Avenue, yes.

Q. In your opinion, your ring levee was as strong as Denver Avenue for water coming from the west?

A. Right.

Q. And I believe you said that there should be no erosion on your ring levee?

A. From the west.

Q. From the west?

A. Because there is a pocket.

Q. Now, you are acquainted with the fact that the water was coming through a narrow underpass,

(Testimony of Thomas A. Middlebrooks.)

are you not? [83] A. Yes.

Q. Would that create any current?

A. Very little.

Q. Pardon?

A. Very little. It had only a small pocket to fill up.

Q. Would that create any current?

A. Very little coming in through there.

Q. In your opinion will a ring levee erode faster than a straight levee?

A. It depends on which side of the ring levee you are talking about.

Q. I am talking in this particular case about the west side. A. On the west side, no.

Q. It would not erode there?

A. Not as fast, because it is in a pocket. It is protected. It is like a ship in a harbor.

Q. However, if there was a current there, then what would occur?

A. I can see no possibility of a current existing there.

Q. Would you answer my question? Let's just assume that there was a current there.

A. Well, if you assume there was a current, the curvature of the levee—the current would be inside the curvature, and I should say that it would probably get about the same or less attack than a straight levee. [84]

Q. Then, in your opinion, water rising gradually on a straight levee erodes just as much as water against a curved levee that is under pressure?

(Testimony of Thomas A. Middlebrooks.)

A. On a curve that is an inside curve rather than an outside curve, which we are talking about here.

Q. You would get just as much erosion, in your opinion? A. On an inside curve, yes, or less.

Q. As a matter of fact, Denver Avenue held, did it not?

A. By a superhuman effort to hold the weak spot.

Mr. Phillips: Will you read that question to him again?

(Last question read.)

A. Yes, it held after a fight.

Q. After what? A. After a flood fight.

Q. Is it customary in levees like this ring levee that you would recommend putting a 16-inch pipe through the bottom of that levee and also putting 10-inch water pipes four or five feet into the levee and leaving them there?

A. Adequately designed pipes are put through levees on numerous occasions.

Q. Do you ever do anything to protect the ends of the pipe or your levee when you do that?

A. The pipe usually has a flap gate on the side from which we expect the water to come.

Q. A what? [85]

A. A flap gate, or a positive closure, one or the other.

Q. Do you ever protect the earth of the levee around the pipe where it comes through the levee?

A. Oh, sometimes, but not on the side which the

(Testimony of Thomas A. Middlebrooks.)

water is entering, usually, unless it is a very large and a very high flood.

Q. Why do you protect the ends of the pipes or your culverts? What happens if you don't?

A. Oh, on your larger culverts, why, you have enough flow to cause erosion.

Q. It would cause erosion?

A. On the larger culverts, yes.

Q. I believe you said you were acquainted with the diking system on the Columbia River. Am I correct in that? A. Yes, sir.

Q. Now, as a matter of fact, no dike in that diking system the same size as Denver Avenue went out during that flood, did it?

The Witness: Will you read that question?

(Last question read.)

A. As far as I know, that is true.

Mr. Phillips: I think that is all, your Honor.

Redirect Examination

By Mr. Lowry:

Q. Do you happen to know now, Mr. Middlebrooks, how the railroad [86] fill on the western embankment at Vanport compares in size to Denver Avenue?

A. Well, generally speaking, I can't quote you the figures exactly.

Q. Mr. Phillips asked you whether or not Peninsula Drainage District No. 1 had any protection from water coming from the east other than the

(Testimony of Thomas A. Middlebrooks.)
Denver Avenue fill and the ring levee. It is true, is it not, that it had the protection of the primary levee of Peninsula Drainage District No. 2?

A. Yes.

Q. And the same thing is true, that Peninsula Drainage District No. 2 had the protection of the primary levees of Peninsula Drainage District No. 1? A. Yes. I tried to point that out.

Mr. Lowry: That is all.

Mr. Phillips: Nothing further.

(Witness excused.) [87]

WILLARD J. TURNBULL

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Turnbull?

A. Vicksburg, Mississippi.

Q. Are you employed by the Corps of Engineers? A. Yes, sir.

Q. What is your position?

A. Chief of the Soils Engineering Division.

Q. You have your office in Vicksburg?

A. Yes, sir; at the Waterways Experiment Station. That is one of the Corps offices there.

Q. What, in general, are your duties?

A. In general charge of investigations in connection with earthen embankments and special prob-

(Testimony of Willard J. Turnbull.)

lems on levee design and research and development problems in military work.

Q. Have you had some professional education as an engineer? A. Yes, sir.

Q. What was that?

A. I graduated in civil engineering in 1925 from the University of Nebraska, and got a civil engineering degree in 1942 from the University of Nebraska.

Q. Would you please summarize your employment since you left [88] school?

A. After graduation in 1925 I served as an officer with the Coast Geodetic Survey in the Philippines for a couple of years. Subsequent to that time, until about '35, I served in various capacities for the Nebraska Highway Department, most of the time as Assistant State Testing Engineer in testing and field inspection of various types of road construction materials. Subsequent to that time I served as Soils Engineer and Chief of the Laboratory for the Central Nebraska Public Power and Irrigation District in Nebraska. In that capacity I had charge of field investigations, geological studies and laboratory tests and design, construction and inspection of earth dams and foundations for various types of hydraulic structures, and a good many miles of core bank levees along sidehill-cut canals. Subsequent to that time and to the present date I have served as Soils Engineer, Chief of the Soils Division, at the Waterways Experiment Station.

(Testimony of Willard J. Turnbull.)

Q. Your experience, then, has included experience with earth dams as well as with levees?

A. Yes, sir.

Q. Have you had some special experience in connection with the design of levees, Mr. Turnbull?

A. Yes, sir.

Q. What was that?

A. The experience usually has had connection with special [89] problems involving seepage or settlement where there were undoubtedly soft foundations.

Q. What levee systems in the United States are you familiar with?

A. The Lower Mississippi Valley system.

Q. About how many years of experience have you had in connection with levee work of one kind or another? A. 12 to 15, I would say.

Q. Has your work included studies of the properties of soils? A. Yes, sir.

Q. Have you done some laboratory work in that connection? A. Yes, sir.

Q. Do you belong to some technical societies?

A. Yes, sir.

Q. Which ones?

A. The American Society of Civil Engineers and the local section group in the community in which I reside, the American Society of Civil Engineers, Highway Research Board, and numerous others, and I have a professional engineer's license from the State of Nebraska.

Q. Is it customary practice in connection with

(Testimony of Willard J. Turnbull.)

the construction of levee systems to build secondary levees to provide protection in the event the primary levees fail? A. No.

Q. To your knowledge, have any such secondary levees been [90] built by the Corps of Engineers?

A. No.

Q. If funds are available for levee construction work, are those funds, in your opinion, spent to the best advantage on primary or secondary levees?

A. On primary levees.

Q. Have you ever recommended the construction of secondary levees to provide protection in the event of failure of the primary levees?

A. No.

Q. Do you know of any standards or specifications for the design or construction of such secondary levees? A. No.

Q. Are you familiar with Paragraphs 1 to 15, inclusive, of the Agreed Statement of Facts on file in this case? A. Yes.

Q. Assuming a system of primary levees and embankments, as there described, was there, in your opinion, any reason to expect that any of the primary levees or embankments would fail structurally? A. No.

Q. What types of failure are considered structural failures, Mr. Turnbull?

A. Well, every type of failure with the exception of overtopping.

Q. Assuming a system of primary levees and embankments, as [91] described in the Agreed

(Testimony of Willard J. Turnbull.)

Statement of Facts, would you have recommended the construction of secondary levees to provide protection in the event of structural failure of the primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, would you have recommended the construction of a secondary levee at the site of Denver Avenue to provide protection in the event of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming such a system of primary levees and embankments, and assuming an underpass through Denver Avenue, would you have recommended the construction of a ring levee around the underpass to provide protection in the event of structural failure of any of the primary levees or embankments? A. No.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage District No. 1 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 2 were not so overtopped?

A. No.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, could the levees of Peninsula Drainage [92] District No. 2 have been overtopped by floodwaters when the levees of Peninsula Drainage District No. 1 were not so overtopped? A. Yes.

Q. Assuming the levee elevations described in the Agreed Statement of Facts, and assuming that

(Testimony of Willard J. Turnbull.)

a ring levee was to be constructed around the Denver Avenue underpass, what was the risk, in your opinion, which the ring levee should have been designed to protect against?

A. Overtopping of the No. 2 primary levees.

Q. Are you familiar with Paragraph 12 of the Agreed Statement of Facts on file in this action describing the ring levee constructed around Denver Avenue underpass? A. Yes.

Q. In your opinion, was the ring levee designed to protect against a particular risk? A. Yes.

Q. What was that risk?

A. Floodwaters in 2 going into 1.

Q. On account of the overtopping of 2?

A. That is right.

Q. What are the facts about the ring levee which in your opinion show that it was designed to protect against the risk that the Peninsula Drainage District No. 2 levees would be overtopped? [93]

A. There are two things. One is the clay blanket on the east side. The other is the floodgate on the east side of the pipe.

Q. In the ring levee? A. Through the fill.

Q. Under all the circumstances described in the Agreed Statement of Facts was it, in your opinion, an exercise of due care and good engineering practice to design the ring levee to protect against the risk that Peninsula Drainage District No. 2 levees would be overtopped? A. Yes.

The Court: It was a secondary levee, though; is that right?

(Testimony of Willard J. Turnbull.)

A. Pardon?

The Court: I thought you said you would not construct a secondary levee any place?

A. I think, your Honor—my opinion would be that on the basis of what must have been in the minds of the people when they constructed the levee, it was that they needed some protection to get the people out of Vanport should the levees in No. 2 overtop. I mean it was just sound thinking. That would be my opinion.

The Court: It would be sound thinking in a lot of these other districts, too, to construct secondary levees in order to stop the flow for a while. Isn't that correct?

A. My opinion would be that that was largely in connection with [94] the large number of people living in Vanport.

The Court: You said, though, that you didn't know anything about any secondary levees under any circumstances and that it is never done, and that you would not do it. Now it seems to me that is entirely inconsistent with what you are saying now.

A. That is from the standpoint of structural failures.

The Court: What?

A. From the standpoint of structural failures.

The Court: But then you said you didn't know any place where a secondary levee was constructed at all; that you didn't know any design for it.

A. That is right.

(Testimony of Willard J. Turnbull.)

The Court: And that you personally would not construct it.

A. To guard against the structural failure of levees.

The Court: If there are no designs, then you don't know of any designs.

A. Well, I think, your Honor, the question—the way I was thinking of it was the design of a levee specifically designed, a secondary levee, to protect against structural failures of primary levees.

The Court: All right. Do you know of any plans for secondary levees?

A. I know of no plans for secondary levees in that sense. Now we do know—— [95]

The Court: Do you know of any in any sense?

A. We know of inferior types of levee construction.

The Court: What does that mean?

A. In the cases of which I am thinking that would be levees which are constructed to protect against low heads where the material is not compacted as well as it is for higher heads, but they would still serve as primary levees.

The Court: As far as I am concerned, this testimony is entirely inconsistent.

Mr. Lowry: Your Honor, perhaps I might explain a little bit what our thought about this matter is. Of course, Mr. Turnbull can talk for himself as a witness, but perhaps I can explain the Government's view on that.

The Court: No; you go ahead and ask him some

(Testimony of Willard J. Turnbull.)
questions. If you want to develop that any further, all right.

Q. (By Mr. Lowry): Mr. Turnbull, are you familiar with Paragraph 13 of the Agreed Statement of Facts on file in this case describing the repair work done on the ring levee in 1944?

A. Yes, sir.

Q. Was the repair work, in your opinion, adequate to bring the levee back to its original condition? A. Yes.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming the inundation of Peninsula Drainage District No. 1 by floodwaters [96] reaching a height of 32.4 feet M.S.L., would you have expected the Denver Avenue fill itself to withstand the pressure of floodwaters indefinitely?

A. No.

Q. What feature or features of the Denver Avenue fill would you have expected to be troublesome?

A. The fact that the Agreed Statement of Facts recognizes that a culvert existed and was plugged, I would have been extremely suspicious of it, and the possibility of stopping the flow of water like that once it starts is very difficult.

Q. Assuming a system of levees and embankments as described in the Agreed Statement of Facts, and assuming floodwater moving to the ring levee from the west, would you have expected erosion of the ring levee? A. No.

Q. Now, assuming a system of levees and em-

(Testimony of Willard J. Turnbull.)

bankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from the east; that is, from the Peninsula Drainage District No. 2 side? A. Yes.

Q. Now, assuming a system of levees and embankments as described in the Agreed Statement of Facts, and a ring levee as there described, would you have considered the ring levee adequate to provide protection against water coming from [97] the west; that is, from the Peninsula Drainage District No. 1 side?

A. I would have considered it approximately as good as the highway fill, in view of the fact that the culvert existed and was plugged, knowing that that would be a weak spot.

Mr. Lowry: You may examine.

Cross-Examination

By Mr. Phillips:

Q. Would you recommend taking out secondary levees? A. Pardon?

Q. Would you recommend taking out secondary levees?

A. I would not recommend building them in the first place.

Mr. Phillips: Would you read the question, please?

(Last question read.)

(Testimony of Willard J. Turnbull.)

A. I think that the answer—the only way I could answer that question is that if a levee or fill is in place economically it would not be sound to take it out. But, basically, on the concept of primary levees, I would never build it in the first place.

Q. My question was, would you recommend taking out a secondary levee that was there?

A. No.

Q. You would not, as I understand your answer now. Is that correct? [98] A. That is correct.

Mr. Phillips: I think that is all, your Honor.

Mr. Lowry: That is all.

(Witness excused.)

(Thereupon a recess was taken until 2:00 o'clock p.m. of the same day, August 5, 1953, at which time Court reconvened and proceedings herein were resumed as follows.) [99]

R. H. BALDOCK

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Where do you live, Mr. Baldock?

A. Salem, Oregon.

Q. Are you employed by the Oregon State Highway Commission? A. I am.

Q. What position do you hold?

A. State Highway Engineer.

(Testimony of R. H. Baldock.)

Q. How long have you held that position?

A. Since 1932.

Q. In general what are your duties as State Highway Engineer?

A. I have charge of engineering matters and am the chief administrative official of the State Highway Department.

Q. Are you familiar with the Interstate Bridge between Portland, Oregon, and Vancouver, Washington? A. I am.

Q. Are you familiar with one of the approaches to that bridge known as Denver Avenue?

A. I am.

Q. Is Denver Avenue an Oregon State Highway? A. It is.

Q. Do you happen to know about when Denver Avenue became an [100] Oregon State Highway?

A. It was placed on the map as a State Highway in 1937.

Q. Has Denver Avenue ever since been an Oregon State Highway? A. It has.

Q. Are you familiar with one of the approaches to the Interstate Bridge known as Union Avenue?

A. I am.

Q. Is Union Avenue an Oregon State Highway?

A. It is.

Q. About when, if you know, did it become an Oregon State Highway?

A. As I recall, it was 1931.

Q. Has Union Avenue ever since been an Oregon State Highway? A. It has.

(Testimony of R. H. Baldock.)

Q. Do you recall that some time in 1942 a proposal was made to build an underpass beneath Denver Avenue? A. I do.

Q. Did that proposal come to your attention, Mr. Baldock? A. It did.

Q. What was the purpose of the proposed underpass?

A. To give access to the town of Vanport.

Q. Was this a proper purpose from a highway and traffic point of view? A. It was.

Q. Was there some safety factor involved in providing for the [101] underpass?

A. It would have been highly dangerous to try to make the access without separating the opposing streams at grade.

Q. Did that require the construction of the underpass? A. It did.

Q. Did you approve the proposal for the construction of the underpass? A. I did.

Q. Did your office prepare the plans for the construction of the Denver Avenue underpass?

A. Yes.

Q. Did an engineer from your office supervise the construction of the underpass? A. Yes.

Q. Do you remember who that was, Mr. Baldock? A. I think it was Mr. Lowell Johnson.

Q. Now, did the plans for the Denver Avenue underpass, as prepared by your office, call for the construction of a ring levee around the underpass?

A. No.

Q. Did those plans call for the construction of

(Testimony of R. H. Baldock.)

any flood control structure in connection with the underpass? A. No.

Q. At about the time the Denver Avenue underpass was constructed was a suggestion made to the Highway Commission by [102] Peninsula Drainage District No. 1 that Denver Avenue should be regarded as a levee? A. Yes.

Q. What was the position of the Highway Commission in that connection?

A. The matter was discussed with the Commission's counsel and with the Commission itself, and on the advice of counsel the Commission instructed Mr. Devers, who was counsel at that time, to answer the communication and to advise Peninsula District No. 1, that at no time had the Highway Commission regarded Denver Avenue as a dike and would not do so now—or then.

Q. Mr. Baldock, did you or the Oregon State Highway Commission have anything to do with the construction or maintenance of the ring levee around the underpass?

A. Well, I can't recall. I know we had nothing to do with the design, and I can't recall whether we looked after its construction or not. All of that work was done with Government funds; none of the State Highway Funds. And we merely looked after the construction of the underpass so as to safeguard the interests of the State Highway Department.

Q. I see. Were you present on Denver Avenue on the evening of May 31st, 1948?

A. I was.

(Testimony of R. H. Baldock.)

Q. Did you participate in the flood fight which was conducted [103] on Denver Avenue on that date? A. I did.

Q. Did the crews from the Oregon State Highway Department participate in that flood fight?

A. They did.

Q. Was equipment belonging to the Oregon State Highway Department used in the flood fight?

A. Yes.

Q. Did trouble develop at the site of a culvert underlying Denver Avenue somewhat south of the underpass? A. It did.

Q. Can you tell us generally what happened there?

A. Well, for quite seme time we thought that we would lose Denver Avenue; in other words, that the flood would wash through it at that point. And only by the use of some mesh material that was used in the last war for landing fields were we able to—with that and sandbags—were we able to stop this erosion. I told them that they should get their barricades and everything ready because I was afraid that the flood would break through at that point.

Q. Was there trouble on any other location along Denver Avenue?

A. Yes. There was also quite serious trouble at the north end of Denver Avenue, not far from the junction with Union.

Q. What happened there? [104]

A. A similar erosion and boiling and the re-

(Testimony of R. H. Baldock.)

moval of material by the floodwaters. But we likewise were able to stop it.

Q. Now, assuming the ring levee had not failed, what is your best judgment as to whether Denver Avenue would have been able to withstand the pressure of the floodwaters?

A. It is my opinion it would not.

Mr. Lowry: You may cross-examine.

Cross-Examination

By Mr. Phillips:

Q. It did withstand it, though, didn't it, Mr. Baldock? A. Sir?

Q. It did withstand it, though, didn't it?

A. Withstood it until the ring levee gave way.

Q. Yes.

A. But it was being continually soaked up and getting weaker all the time, in my opinion.

Q. Denver Avenue didn't give way; it was the ring levee, wasn't it?

A. That is right. The ring levee finally gave way.

Q. And this place at the culvert you say you were afraid of, that was successfully plugged? It didn't give way there, did it?

A. It was at the time, yes.

Q. Pardon? [105]

A. I say, we did plug it at the time.

Q. And it held, didn't it?

A. Yes, it did.

Q. The only place that the water went through

(Testimony of R. H. Baldock.)

Denver Avenue, was when the ring levee broke and where the ring levee broke; isn't that so?

A. That is right.

Q. Now, I believe you say that you consider Denver Avenue as a highway. That is correct, isn't it?

A. That is right.

Q. And so advised District No. 1?

A. Yes.

Q. You had another highway to the west of District No. 1, named Portland Road, down there on the railroad fill, didn't you?

A. I don't remember the name of it. It is a section that goes to the west of the railroad track.

Q. There is a highway there?

A. That is right.

Q. I believe it is admitted that it is Portland Road down there on the railroad fill?

A. A highway at low level, yes.

Q. Beg pardon?

A. It is a highway at a very low level.

Q. But it is there, isn't it?

A. Yes. [106]

Q. Now, do you consider that as anything but a highway?

A. That is all it is as far as I am concerned.

Q. What would you consider the railroad fill? Just a railroad fill and a railroad?

A. Well, as far as I was concerned, it was a railroad.

Q. Nothing else but a railroad and a railroad fill?

(Testimony of R. H. Baldock.)

A. I understood that the diking districts considered it as a dike, but we were not interested in dikes and had nothing to do with them.

Q. You also knew that District No. 2 considered Denver Avenue as a dike, didn't you?

A. Yes. I think No. 1 were the ones that considered it a dike. We wrote to both of them.

Q. What about No. 2 to the east of it there?

A. Well, at the time that we planned to pierce Denver Avenue with the underpass, I wrote a letter to both the secretaries of District 1 and District 2, and told them that we were planning to do it, and that we had heard rumors that they considered it a dike, which we would not acknowledge and accepted no responsibility therefor. I can't remember the exact language, but words to that effect.

Q. Whatever name you call it, it was a pile of dirt there with a concrete top on it that stopped the floodwaters; isn't that correct?

A. Stopped the floodwaters temporarily. [107]

Q. Until the ring levee broke that you had nothing to do with? A. That is right.

Q. So Denver Avenue did not break and it did stop the water so far as Denver Avenue was concerned, didn't it?

A. It did up to that time. I stated that I don't think it would have very long.

Q. You said that before? A. Yes.

Q. But it did hold, didn't it?

A. That is right; it did.

(Testimony of R. H. Baldock.)

Q. Now, down at the north end you said you had some trouble down there. That was successfully blocked, too, wasn't it? A. We did, yes.

Q. Do you know where the ring levee broke?

A. Well, it broke, as I recall, about the northeast quadrant, more to the east than the north.

Q. Now, Union Avenue had a couple of culverts through it and also it had an underpass through it, didn't it?

A. I can't recall the underpass on Union. It had culverts that were put through by the Drainage District.

Q. The east side of Union Avenue, Drainage District No. 2, east of Union Avenue was drained to the west down to the pumping station by the side of Denver Avenue; is that correct?

A. I can't tell you, sir. [108]

Q. You don't know that?

A. I don't recall it, no.

Q. Do you know where the pumping station was out there? A. Yes, I remember it.

Q. Do you know that there was no pumping station east of Union Avenue?

A. I don't recall any.

Q. That is, in District No. 2? A. Yes.

Q. Do you know which way the water drained, whether it was from east to west or west to east, in District No. 2?

A. No, we were not interested in the drainage, and therefore I wasn't advised of it.

Q. You said that you were afraid that Denver

(Testimony of R. H. Baldock.)

was going out, and that you were down there working on the flood control; that you wanted to save Denver Avenue. It wasn't just Denver Avenue you wanted to save, but it was the people's property east of Denver Avenue, was it not?

A. In a matter of great emergency the State Highway Department always does what it can to help.

Q. Were you trying to save the lives and the property of people east of Denver Avenue from the floodwaters?

A. We were trying to stop the floodwaters from breaking through.

Q. Why?

A. Because, in the first place, it would be doing a great [109] damage to property; in the second place, it would stop traffic on Denver Avenue. It was quite apparent that Union Avenue would fail quite quickly, and it subsequently did; so we were trying to keep the traffic ways free, and likewise do what we could to help out other people. I might say in a matter of emergency that way we didn't ask what our authority was or what our responsibilities were, or anything. We were just trying to help everybody else that was working there.

Q. And along the same line there were any number of volunteers, weren't there? It wasn't only Highway equipment and Highway people; there was any number of volunteers trying to do the same thing? A. That is right.

Q. Isn't that true? A. That is right.

(Testimony of R. H. Baldock.)

Q. You were all trying to do the same thing, to hold the water there at Denver Avenue, weren't you? A. That is right.

Q. Because Denver Avenue was the best place to hold the water that you had out there; isn't that right?

A. Well, after the water had broken through the railroad fill Denver Avenue was the only way to keep it from going towards the east.

Q. What did you consider that little ring levee around there that was attached to your highway? Was that a levee of any [110] kind, or was that part of your highway, or what was that?

A. It wasn't part of the highway. It was added after the plans were prepared for the Denver Avenue underpass. As I remember, it was added by the Housing Administration. I know that we had nothing to do with it, and never assumed any responsibility for it.

Q. It hooked onto your highway, didn't it?

A. It did. We gave them a permit to do that.

Q. On both ends?

A. Yes. We gave them a permit to hook on.

Q. Yes, to prevent water from going through there. That was what it was for, wasn't it?

A. It was for whatever their purpose was. We had no purpose in it whatsoever.

Q. Do you know what purpose it was for?

A. Well, it was evident that it was a ring dike, yes.

Q. What?

(Testimony of R. H. Baldock.)

A. It was evident that it was a ring dike. But we told them and we told everybody else in writing that we didn't consider Denver Avenue a dike, had never considered it a dike, and would pierce it in order to facilitate traffic flow between Denver Avenue and the town of Vanport.

Q. Did you know that the fill in Denver Avenue was partially on private property?

A. Please? [111]

Q. Did you know that the fill of Denver Avenue was partially on private property?

A. I think that that was there by reason of slope easements. It is quite customary to get certain right-of-way by slope easements, and I am quite sure that there are slope easements on Denver Avenue, although I have never checked it.

Q. You haven't looked at the deeds from Multnomah County? A. No, I haven't.

Q. Nor your contract with Multnomah County; you haven't looked at that?

A. Yes, I have, but it has been quite some time ago.

Mr. Phillips: I think that is all.

The Court: About this right-of-way on Denver Avenue. Is that in the stipulation?

Mr. Lowry: Yes, your Honor, and the deeds from Multnomah County.

The Court: That is all right. I thought that was the case, but I wanted to be sure.

Mr. Lowry: Yes, it is in.

(Witness excused.)

Mr. Lowry: That closes the Government's case, your Honor. [112]

F. R. SCHANCK

was recalled as a witness in behalf of the Plaintiffs, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Mr. Schanck, are you acquainted with that railroad fill to the west of District No. 1?

A. I have observed it, and I have talked to the men who were there when it was built.

Q. Have you made a study of the construction of that railroad fill? Do you know how it was constructed?

A. I of course have observed the size and shape of it, but the information as to how it was constructed came to me from the engineers who were in charge of it.

Q. And this pre-trial order? A. Yes.

Q. In your opinion, Mr. Schanck, I will ask you whether or not the Denver Avenue fill was more effective in stopping water coming from the west to the east than the railroad fill?

A. Yes, sir; very much more effective.

Mr. Phillips: I think that is all.

Mr. Lowry: That is all.

(Witness excused.)

Mr. Phillips: That is our case, your [113] Honor.

Mr. Lowry: We are through.

The Court: What do you want to do about submission, now?

Mr. Lowry: Your Honor, I think under the circumstances it might be helpful to the Court and I certainly think we would appreciate the opportunity to brief the case and argue it, if that is satisfactory.

The Court: I assume that that will be the line to be followed. How much time do you want for briefs?

Mr. Ralston: Your Honor, I assume that it will take approximately three weeks, in view of the fact I would like to have the testimony transcribed before we write the brief. I would therefore ask your Honor that we be permitted to present our brief——

The Court: Let's settle the question of a transcript first. The transcript won't be very long, even the whole of it. Are you ordering the transcript?

Mr. Lowry: Yes, your Honor.

(Discussion in re time for preparing transcript.)

The Court: All right. I will set 10 days for delivery of the transcript. Then how much time do you want from that?

Mr. Ralston: Until September 15th, your Honor.

The Court: All right.

Mr. Lowry: Then I would like to have one month, your Honor, because this material has to go to Washington. [114]

The Court: Yes. October 15th for your brief, and a reply brief in 10 days thereafter, or October

25th. At that time, if I feel it is necessary, I shall order an oral argument, after all the briefs are in.

Mr. Lowry: Thank you very much.

The Court: If I don't, I will go ahead and decide the case. After I see all the briefs if I feel there is a necessity for oral argument I will order it and advise you and set a convenient time.

I appreciate the care with which this pre-trial order has been prepared. It seems to me it is very well done, and I compliment counsel.

(Whereupon proceedings in the above matter on said day were concluded.) [115]

Reporter's Certificate

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on August 4 and 5, 1953, I reported in shorthand the proceedings had in the above-entitled matter; that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 115, both inclusive, constitutes a full, true and accurate transcript of said proceedings so reported by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 13th day of August, 1953.

/s/ JOHN S. BECKWITH,
Official Reporter.

[Endorsed]: Filed February 11, 1954.

EXHIBIT No. 8

Yo. Aud. Files Denver Avenue Underpass

Prime Contract No. HA(ORE-35053)cph-101

Contract

Between Kaiser Company, Inc., "Contractor"
and
Tower Sales & Erecting Company, "Subcontractor"

Portland, Oregon—October 20, 1942

Agreement

This Agreement, Made and entered into this 20th day of October, 1942, by and between Kaiser Company, Inc., a Nevada Corporation, (Portland Yard), hereinafter called the "Contractor," and Tower Sales & Erecting Company, a Corporation, 6100 N. E. Columbia Boulevard, Portland, Oregon, hereinafter called the "Subcontractor,"

Witnesseth:

Whereas, the Contractor has heretofore entered into a contract dated August 1, 1942, with the United States of America (hereinafter called the "Owner"), represented by the Federal Public Housing Authority, (hereinafter called the "authority"), being Contract No. HA (Ore-35053) cph-101, (hereinafter called the "Principal Contract"), for the construction of certain housing units together with necessary school and other public build-

Exhibit No. 8—(Continued)

ings and utilities (all of the aforesaid being hereinafter called the "Facilities"), in the vicinity of Portland, Oregon; and

Whereas, Subcontractor has read and is familiar with each and every part of said Principal Contract and the respective rights, powers and benefits and liabilities of the Contractor and the Authority thereunder; and

Whereas, it is the desire of the parties hereto that Subcontractor shall perform certain work in connection with the construction of the Facilities;

Now, Therefore, in consideration of the premises and the compensation as hereinafter provided to be paid by the Contractor to the Subcontractor and the mutual covenants, agreements and conditions hereinafter contained, the parties hereto agree as follows:

Article I.

Statement of the Work

The Subcontractor shall in the shortest possible time furnish the labor, materials, tools, machinery, equipment, facilities, supplies, and services not furnished by the Contractor or the Authority and do all things necessary for the construction and completion of, and shall construct and complete the following:

A highway underpass under Denver Avenue north of the City of Portland in Multnomah County, Ore-

Exhibit No. 8—(Continued)

gon, providing access to and egress from the Facilities. The work to be performed shall include:

(1) The construction and maintenance (during the construction period) of temporary traffic detour bridges and the dismantling thereof upon completion of the construction period;

(2) The obtaining, transportation and placing of all necessary fill material;

(3) The performance of all necessary grubbing and clearing work;

(4) The placing of all necessary curbing and the paving and finishing of ramps to the underpass;

(5) The performance of all other items of work shown in Exhibit "A" mentioned in Article V hereof.

all of the foregoing being herein called the "Work."

Any labor, materials, tools, machinery, equipment, facilities, supplies or services furnished to Subcontractor by Contractor in connection with the performance hereof will be billed to and paid by the Subcontractor at cost or the reasonable market value thereof, whichever the Contractor elects.

Such Work shall be executed in the best and most workmanlike manner by qualified, careful and efficient workers in strict conformity with Oregon State Highway Commission Plans and Specifications Nos. 7778 and 7779, which plans and specifica-

Exhibit No. 8—(Continued)

tions are by this reference incorporated in this contract as fully as though set forth herein.

The Subcontractor shall complete the work by the 12th day of December, 1942. The time of completion shall be extended by the time during which Subcontractor is delayed in said work by the acts of omission or commission of Contractor, or the employees or agents of Contractor, or the acts of God, or the elements, which Subcontractor could not reasonably foresee and provide against, or other causes beyond Subcontractor's control, including strikes, boycotts, or like obstructive action by employees or labor organizations, or lock-outs or other defensive action by other employers, whether general or individual, or by an organization of other employees, or by the order, regulation or action of any government or acting authority. Subcontractor shall not be entitled to and hereby waives any and all damages which it may suffer by reason of Contractor hindering or delaying Subcontractor in the progress of said work, or any portion thereof or from any cause whatsoever.

As a condition precedent to the award of any order or contract hereunder, the Subcontractor shall obtain the approval of the Authority or its duly authorized representative, and upon the approval of the Authority or its duly authorized representative the Subcontractor may award orders or contracts upon the basis of market or negotiated prices. There shall be no mingling of purchases covering

Exhibit No. 8—(Continued)

materials or services required under this contract and those required by the Subcontractor for other work.

Article II.

No Representations to Subcontractor

It is distinctly understood and declared by the Subcontractor that this agreement is made for the consideration herein named and that the Subcontractor has, by careful examination, satisfied Subcontractor as to the nature and location of the work, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can in any way affect the work under this agreement. No verbal agreement or conversation with any officer, agent or employee of the Contractor, shall affect or modify any of the terms or obligations herein contained.

Article III.

Inspection

All materials and workmanship furnished in the performance of this Contract shall be subject to inspection and test by the Contractor, the Authority and the Oregon State Highway Commission, at any and all times during the manufacture or construction and at any and all places where such manufacture or construction is carried on. The

Exhibit No. 8—(Continued)

Authority and the Oregon State Highway Commission acting by and through the Contractor shall have the right to reject materials and workmanship determined to be defective, and require correction or replacement thereof, at the Subcontractor's expense, if the defect is due to the act, neglect or default of the Subcontractor or its agents or employees.

Article IV.

Changes

The Authority or its duly authorized representatives may, by written order, approve changes in or additions to the Work to be performed hereunder, provided, however, that in all such cases Contractor and Subcontractor shall value or appraise such changes in a fair and reasonable manner, and add to or deduct from the amount herein agreed to be paid to Subcontractor at pro rata rates, but in no case shall such changes be made unless notice in writing is given to Subcontractor by Contractor.

Article V.

Compensation

Contractor agrees to pay Subcontractor for all work performed hereunder in conformance with said plans and specifications, the following amounts, to wit:

See attached payment schedule marked Exhibit "A" and by this reference made a part hereof.

Exhibit No. 8—(Continued)

Some of the quantities and amounts shown in the said Exhibit "A" have been estimated for the purpose of determining the approximate contract price of this agreement. The actual quantities of work performed hereunder may be more or less than those herein stated, and it is agreed that payment shall be made for the actual quantities of work performed under the items shown in the said Exhibit "A" multiplied by the stated unit prices, if any. The amount to be paid for "lump sum" items shall not vary, regardless of the actual quantities of work performed under such items.

Article VI.

Terms of Payment

Payment of the compensation provided for in Article V hereof will be made monthly in accordance with the progress of the work and estimates thereof prepared by the Engineering Department of the Contractor, less 10%. The remaining 10% shall be included in the final payment; provided, however, that such final payment shall not be made until to the satisfaction of the Contractor, all liens or attachments which have been filed or levied in connection with the work provided for herein are satisfied and discharged of record. The Contractor's calculations of such estimates shall be final, conclusive and binding upon Subcontractor.

Exhibit No. 8—(Continued)

Article VII.

Acceptance of Work

It is mutually agreed that no payment made under this agreement, except the final payment shall be evidence of the performance of this agreement either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article VIII.

Insurance and Bond

If requested by Contractor, Subcontractor shall furnish at its own cost and expense, two separate bonds, one for "Performance" coverage in the amount of 50% of the contract price, and the other for "Payment" coverage in the amount of 50% of the contract price, the two together being equal to 100% of the contract price. The latest revision of Government Standard Form 25 ("Performance") and Form 25-A ("Payment") shall be used, and the bonds shall be issued by a bonding company on the approved list of the Treasury Department (Form 356). The Federal Public Housing Authority as well as the Contractor shall be named as Obligee on the bonds. Such Bonds shall be furnished, if required by Contractor, before any work is commenced under this contract.

Subcontractor shall procure, carry and maintain

Exhibit No. 8—(Continued)

on all of its operations hereunder, such policies of insurance, in such amounts and insuring against such risks as Contractor may require. Such policies shall include, without limitation, Workmen's Compensation Insurance, Public Liability and Property Damage Insurance, and Automobile Public Liability and Property Damage Insurance. Such policies shall be in such form and shall be issued by such company or companies as may be satisfactory to Contractor. Subcontractor shall pay all premiums on such insurance and on the bonds herein referred to. Subcontractor shall carry Workmen's Compensation Insurance with the Industrial Accident Commission of the state of Oregon. Subcontractor shall furnish to Contractor within 10 days after the commencement of work hereunder five (5) certificates of insurance from the insurance companies or carriers providing the aforementioned insurance coverage. Such certificates shall provide for at least ten (10) days' notice of cancellation, such cancellation notice to be given by either party to the insurance contract to the Contractor. All of such policies of insurance shall carry endorsements by the terms of which Contractor and the Authority as their interest may appear, shall be deemed additional insureds.

Article IX.

Title to Facilities

Title to the Facilities, even though said Facilities are affixed to realty belonging to or leased by an-

Exhibit No. 8—(Continued)

other, completed or in the course of construction, shall be in the Owner. In the event title to any materials, tools, machinery, equipment, and supplies purchased to become a part of said Facilities is transferred from the vendor, or supplier prior to delivery at the site or on approved storage site, such title shall, upon such transfer, vest in the Owner. Title to any such materials, machinery, or equipment ordered from any vendor or supplier to the extent that the Contractor, Owner or Subcontractor makes payment therefor, even though such vendor or supplier has not made delivery thereof at the site of the Facilities, nor completed the Work required of him with respect thereto shall vest also in the Owner. These provisions as to title being vested in the Owner shall not operate to relieve the Subcontractor from any duties imposed under the terms of this Contract.

The Work shall be positively and adequately identified. The Subcontractor shall record the interest of the Owner, as may be required by the Authority in the Work and in such materials, tools, machinery, equipment, and supplies, and shall take all necessary steps to give to third parties notice of such interest. The Subcontractor will also, upon request of the Authority, execute and deliver to the Authority such deeds, bills of sale or other instruments as the Authority may deem necessary to transfer or confirm to the Owner title to all such property or any other rights of the Authority or Owner hereunder in respect to the Work.

Exhibit No. 8—(Continued)

Article X.

Liens

Subcontractor expressly agrees to discharge at once all liens which may be filed in connection with said Work and hold Contractor and the Authority and the owners of the premises upon which the Work is to be performed, harmless therefrom. In the event that Subcontractor fails to satisfy said liens, Contractor, upon five (5) days' written notice may satisfy said liens and deduct the cost thereof from any money due Subcontractor from Contractor, or may demand and receive payment therefor from Subcontractor.

Article XI.

Subcontractor to Remove Debris and Materials

Upon termination or completion of said work, Subcontractor shall remove all debris and waste material and leave the premises in a neat and clean condition, all to the satisfaction of Contractor. Scrap and other material of value not incorporated in the facilities shall be turned over to or left with Contractor.

Article XII.

Subcontractor Not Agent of Contractor

In the execution of the work provided for herein, Subcontractor shall operate as an independent Contractor, and not as the agent of the Contractor.

Exhibit No. 8—(Continued)

It is expressly agreed that Subcontractor shall hold Contractor free and harmless from all liability of every kind and nature, and from all claims for damages by reason of any act or representation of Subcontractor, its agents or employees, and Subcontractor hereby covenants and agrees to indemnify and save Contractor harmless from all costs and expenses growing out of any such claim or liability.

Article XIII.

Taking Over or Stopping of Work

Should Subcontractor at any time during the progress of the work fail, or refuse, or neglect to supply sufficient labor, tools, implements, equipment, machinery or materials, or properly skilled workmen to complete same with reasonable diligence and dispatch, except when due to circumstances which Subcontractor cannot be reasonably expected to control, as provided in Article I hereof, and should such failure, neglect, or refusal continue for five (5) days after written notice shall have been served by Contractor on Subcontractor, Contractor is hereby given the right to take over the said work and complete it. The cost to Contractor of doing such work or the amount Contractor has agreed herein to pay Subcontractor therefor, whichever is the greater, shall be deducted from any moneys due Subcontractor, under this agreement, and if such cost or amount exceeds any such moneys due Sub-

Exhibit No. 8—(Continued)

contractor, Subcontractor agrees to reimburse Contractor for such excess.

Contractor hereby reserves the right to stop said work and terminate this contract at any time upon written notice, it being understood, however, that in any such event, except as provided in the next preceding paragraph of this Article, Contractor shall pay Subcontractor for all work done in conformity with this agreement and the said plans and specifications, plus a reasonable amount, if any, to be determined by Contractor, representing loss, Subcontractor would in such event sustain through money expended or necessary to be expended by Subcontractor as a result of the inability to complete the work contemplated. In the event of such stoppage if work and termination of this agreement, the consideration provided in this paragraph shall be paid within forty-five (45) days after the date of the said written notice; provided, however, that in any event, final payment shall not be made until all liens, stop notices or attachments which have been filed or levied in connection with the work provided for herein, are satisfied and discharged of record.

Article XIV.

Patents

The Subcontractor shall hold and save the Contractor, and the Owner, their officers, agents, servants and employees harmless from liability of any nature or kind, including costs and expenses, for

Exhibit No. 8—(Continued)

or on account of the use or manufacture of any patented or unpatented invention, article, or appliance manufactured or used in the performance of this Contract, including their use by or for the Government after installation; Provided, however, that this requirement shall not be construed to extend to anything supplied by the Owner or the Contractor, or which the Owner or Contractor might direct Subcontractor to purchase in connection with this contract.

Article XV.

Eight-Hour Law—Overtime Compensation

No laborer or mechanic doing any part of the work contemplated by this Contract, in the employ of the Subcontractor or others shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Subcontractor or others engaged in the performance of this Contract shall be computed on a basic day rate of eight hours per day, and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of $5.00

Exhibit No. 8—(Continued)

shall be imposed upon the Subcontractor or other person for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said Work without receiving compensation computed in accordance with this Article, and all penalties thus imposed shall be withheld for the use and benefit of the Government; Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, Title 40, Secs. 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

Article XVI.

Convict Labor

(a) The Subcontractor shall not employ upon the Work covered by this Contract any person undergoing sentence of imprisonment at hard labor.

(b) Qualifications for Employment. There shall be no discrimination because of race, creed, color, national origin or political affiliations, in the employment of persons for Work on the Project.

Article XVII.

Affidavit Concerning Rates of Pay for Labor

(a) The Subcontractor will comply with the provisions of Public Act No. 324, 73rd Congress,

Exhibit No. 8—(Continued)

approved June 13, 1934, (48 Stat. 948) and with the provisions of the regulations issued by the Secretary of Labor thereunder, entitled, "Regulations Applicable to Contractors and Subcontractors on Public Building and Public Work and on Building and Work Financed in whole or in part by Loans or Grants from the United States," published in the Federal Register March 1, 1941.

(b) This Contract is subject to the provisions of the Act of June 25, 1936, (40 U. S. C. 290), entitled, "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several states jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

(c) The Subcontractor shall pay all mechanics and laborers employed on Work under this Contract and directly upon the site of the Work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931, (46 Stat. 1494) to be the prevailing rates for the various classes of such laborers and

Exhibit No. 8—(Continued)

mechanics; and the scale of wages to be paid shall be posted by the Subcontractor in a prominent and easily accessible place at the site of the Work. The Contractor shall have the right to withhold from the Subcontractor so much of accrued payments as may be considered necessary by the Authority to pay to laborers and mechanics employed by the Subcontractor on the Work the difference between the rates of wages required by the Contract to be paid laborers and mechanics on the Work and the rates of wages received by such laborers and mechanics and not refunded to the Subcontractor or his agents. The Contractor will furnish the Subcontractor with the wage scale determined by the Secretary of Labor as aforesaid, and until such wage scale is so furnished, the Subcontractor shall be under no obligations under the provisions of this paragraph.

Article XVIII.

Domestic Preference

In the performance of the Work covered by the Contract, the Subcontractor, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; the foregoing provision shall not

Exhibit No. 8—(Continued)

apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3 of the Act of Congress, approved March 3, 1933, (41 U. S. C. 10).

Article XIX.

Not Transferable

This Contract shall not, nor shall any interest therein, be transferred by the Subcontractor to any other person or persons without the approval of the Contractor.

Article XX.

Fees

The Subcontractor warrants that he has not employed any person to solicit or secure this Contract upon any agreement for a commission, percentage, brokerage, or fee contingent or otherwise. Breach of this warranty shall give the Contractor the right to terminate the Contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fee. This warranty shall not apply to commissions payable by Subcontractors upon contracts or

Exhibit No. 8—(Continued)

sales secured or made through bona fide established commercial or selling agencies maintained by the Subcontractor for the purpose of securing business.

Article XXI.

Officials Not to Benefit

No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this Contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this Contract if made with a corporation for its general benefit.

Article XXII.

Disputes

Except as otherwise specifically provided in this Contract, if any doubts or disputes arise concerning any question hereunder or as to anything in the plans or specifications, or if any discrepancy appears between said plans or specifications and this Contract, the matter shall be referred at once to the Federal Public Housing Commissioner for determination; and his decision in the premises shall be conclusive and binding upon the parties hereto.

Article XXIII.

Prohibition Against Employment of Certain Persons

(a) As a condition to the employment by the Subcontractor of any person to perform any of the

Exhibit No. 8—(Continued)

Work contemplated by this Contract and who will be paid from any funds made available under this Contract, the Subcontractor shall, if the Contractor or the Authority so directs, require such person to execute and to file an affidavit in such form as to satisfy the requirements of Public Law No. 5 (77th Congress), but the execution and filing of such affidavit shall be without prejudice to the right of the Contractor or the Authority to require such further evidence in the premises as it may deem desirable.

(b) The Authority may require the removal or discharge of any person employed in or about the Work if it is determined that the employment of such person is detrimental to the performance of the Work under this Contract.

Article XXIV.

Liability

Except as otherwise provided herein, Subcontractor expressly agrees to indemnify and save the Contractor and the Authority harmless from and against any and all claims, loss, damage, injury and liability howsoever same may be caused resulting directly or indirectly from work covered by this contract.

Article XXV.

Attorney's Fees

In case Contractor shall bring suit to compel performance of or to recover for breach of any

Exhibit No. 8—(Continued)

covenant, agreement, or condition herein written, Subcontractor agrees to pay Contractor such sum as the court may adjudge to be reasonable as attorney's fees.

Article XXVI.

Notices

All notices given to the parties hereunder shall be directed to their business addresses first hereinabove stated. All such notices shall be deemed properly given by depositing the same in any United States Post Office in an envelope with postage thereon prepaid, directed to the parties hereto at such addresses.

Article XXVII.

Application of Principal Contract to Subcontractor

In his performance of this Contract, Subcontractor shall be subject to and shall comply with all the applicable provisions and conditions of the Principal Contract.

Article XXVIII.

Overtime Compensation

(a) The Subcontractor agrees to perform the work on the basis of a three-shift day without shutdown on Saturdays, Sundays, or other holidays.

(b) The wages of every laborer and mechanic engaged in work on the Project shall be computed

Exhibit No. 8—(Continued)

on a basic day rate of eight hours per day. When a single shift is employed, eight hours of continuous employment, except for lunch periods, shall constitute a day's work. When two or more shifts are employed, seven and one-half hours of continuous employment, except for lunch periods, shall constitute a day's work. (Wherever practicable shifts shall be rotated.)

Article XXIX.

Authority's Representative

Any decision or determination required to be made by the Owner or the Authority will be made by the representative of the Authority located at the site of the Project.

Article XXX.

Contract Subject to Approval by Authority

This Contract shall not become effective unless and until it is approved by the Authority.

In Witness Whereof, the parties hereto have executed this Contract as of the day and year first above written.

KAISER COMPANY, INC.,
Portland Yard;

By /s/ A. R. NUMAN,
Asst. Gen. Mgr.,
Contractor.

Exhibit No. 8—(Continued)

Witnessed by:

/s/ MARY K. MOORE.

TOWER SALES & ERECTING COMPANY,

By /s/ C. FISHER,
President,
Subcontractor.

Witnessed by:

/s/ ROSEMARY ALEXANDER.

Approved:

GOV'T REP.,

By /s/ A. A. PIERSON,
F. P. H. A.

EXHIBIT "A"

Item No.	Description	Quantity	Unit Price	Total
1.	Furnishing Fir peeled piling..	4,400 Ft.	$ .40	$ 1,760.00
2.	Driving piling.....	63 only	45.00	2,835.00
3.	Furnishing in place all lumber in permanent bridge.....	126,000 Ft.	100.00	12,600.00
4.	Furnishing Detour Bridge in place.....	1 only	Lump Sum	10,000.00
5.	Removal of Detour Bridge.....	1 only	Lump Sum	3,000.00
6.	Install Traffic Lights and Signs and maintain traffic.....	All Reqd.	Lump Sum	2,000.00
7.	Removal of old pavement on top of new bridge.....	710 Sq. Yds.	1.00	710.00
8.	Excavation for Underpass Bridge as shown on Drawing No. 7778.....	7,000 Yds.	1.50	10,500.00
9.	Removal of concrete curb.....	3,200 Ft.	.50	1,600.00
10.	Remove 12 light standards and reinstall 110 volt light circuit per State Specification....	All Reqd.	Lump Sum	1,500.00
11.	Fill material delivered in place. Payment based on truck measure.....	80,000 Cu. Yd.	1.10	88,000.00
12.	Furnishing in place gravel sub-base material. Payment based on truck measure.....	2,500 Cu. Yd.	2.00	5,000.00
13.	Furnish in place armour coat oil surfacing.....	9,000 Sq. Yd.	1.00	9,000.00
14.	Remove and reinstall concrete curb on West side of Denver Ave. to allow for detour bridge.....	300 Ft.	2.00	600.00
15.	Furnish and install concrete divider strip.....	700 Lin. Ft.	1.00	700.00
16.	Concrete in place as ordered..	30 Cu. Yd.	35.00	1,050.00
17.	Furnish and install 18 in. culvert.....	300 Lin. Ft.	4.00	1,200.00
18.	Clearing trees and brush, East side of Denver Ave. in fill areas.....	All Reqd.	Lump Sum	1,500.00
19.	Cleaning up of site.....	All Reqd.	Lump Sum	1,000.00

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 12

Oregon Shipbuilding Corporation
Portland, Oregon

August 28, 1942.

State Highway Commission,
State of Oregon,
Salem, Oregon.

Gentlemen:

Kaiser Company, Incorporated, under contract to The Maritime Commission, has started construction on a housing project to house six thousand families. This project will lie on the west side of Denver Avenue just north of the Columbia Slough.

At the present time, there is contemplated only the construction of two entries from this project, both on the west side of Denver Avenue. Due to the volume of traffic that will daily go in and out of this project, plus the heavy traffic on Denver Avenue at present, this is not felt safe or adequate.

We therefore request the State Highway Department to build entrance roads to this project leading from the east side of Denver Avenue to the project by means of an underpass. We would appreciate it if this construction could be done now while the houses are under construction and, before the matter has become further complicated by the flow of traffic in and out of this area.

We would appreciate an early reply from you on

this subject stating your position; and, if favorable, any information we might have on how we could be of assistance to you.

Respectfully,

/s/ JOHN E. MEAD,
Housing Administrator.

JEM:en

[Stamped]: Received August 29, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 13

September 1, 1942.

Mr. John E. Mead,
Housing Administrator,
Oregon Shipbuilding Corporation,
Portland, Oregon.

Dear Sir:

Confirming phone conversation in reply to your letter of August 28, advise that the project you desire, consisting of an underpass on Denver Avenue with approach ramps in the various quadrants to permit the construction of a traffic interchange eliminating cross traffic at grade, should be initiated by Admiral Freeman through the Public Roads Administration.

This department will be very glad to design the structure and to contract its construction, provided

that it is certified as an access road project and federal funds are provided for the cost of the work.

Very truly yours,

R. H. BALDOCK,
Chief Engineer.

RHB:HI

Received October 9, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 14

September 12, 1942.

Mr. T. G. Donaca, Secretary,
Peninsula Drainage District No. 1,
811 American Bank Building,
Portland, Oregon.

Dear Sir:

The Oregon State Highway Commission, in cooperation with the Federal Housing Authority, has under consideration the construction of a traffic interchange at the point where the access road to the housing development in Peninsula Drainage District No. 1 enters Denver Avenue about 150 yards north of Columbia Slough. This traffic interchange will necessitate cutting through the Denver Avenue embankment. It is our understanding that the continuing of the Denver Avenue embankment as a dike is of no further interest to your district.

This is to advise you of our tentative plans and to further advise you that the State is under no obligation to maintain the road grade as a dike facility in any respect.

Very truly yours,

R. H. BALDOCK,
Chief Engineer.

GSP:CM

cc: G. S. Paxson.

Received September 15, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 15

October 10, 1942.

Law Offices of
Ivan F. Phipps
1226 American Bank Building
Portland, Oregon

Oregon State Highway Commission,
Salem, Oregon.

Attention: Mr. R. H. Baldock, Chief Engineer

Gentlemen:

Under date of September 12, 1942, you addressed a letter to Mr. T. G. Donaca, Secretary, Peninsula Drainage District Number One, stating that the Commission has under consideration an underpass under the Denver Avenue Approach to the Inter-

state Bridge; and further, that the State is under no obligation to maintain the road grade as a dike facility.

In order that the Peninsula Drainage District Number One may determine its attitude upon this proposed cutting of its dike protection, it is requested that you kindly furnish us a copy of your proposed plan. Such an underpass may be constructed without injury to the District's protection against flood waters by the construction of a suitable flood wall or bulkhead, and we trust that you are prepared to protect the District in this manner.

Since the District was established with Denver Avenue as one of its dikes, and the proceeding under which the District was organized was regularly advertised and approved by the Circuit Court, it would seem that Multnomah County, and the State of Oregon as successor to Multnomah County's rights and obligations in connection with the maintenance of the highway, are definitely under a legal duty not to impair or weaken the District's dikes or to endanger the property within the District. In any event the District desires to examine your tentative plans for the proposed underpass, and will advise you as to its position in the matter as soon as such plans have been received and examined.

Yours very truly,

/s/ IVAN F. PHIPPS,

President, Peninsula Drainage District Number One.

Received October 13, 1942.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 16

October 13, 1942.

Mr. Ivan F. Phipps, President,
Peninsula Drainage District Number One,
1226 American Bank Building,
Portland, Oregon.

Dear Sir:

In accordance with your request of October 10, I am sending, under separate cover, a print showing the general location and arrangement of the proposed traffic interchange at the Denver Avenue Housing Project. I am also sending prints from our Drawings No. 7778 and 7779 showing the plans for the structure itself.

Very truly yours,

R. H. BALDOCK,
Chief Engineer.

GSP:CM

cc: G. S. Paxson.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 17

Oregon State Highway Commission
Salem

October 20, 1942.

Mr. Ivan F. Phipps, President,
Peninsula Drainage District No. 1,
1226 American Bank Building,
Portland, Oregon.

Dear Mr. Phipps:

I have just been handed by the Highway Engineer a copy of your letter addressed to him under date of October tenth with respect to the proposal of the Highway Commission to construct an underpass for traffic beneath the Denver Avenue approach to the Interstate Bridge.

In your letter you indicate that it is your position that the State is responsible for any damage which the District may sustain by reason of the construction of the underpass. I cannot accept your theory that the State is in any way responsible to the irrigation district for any damage which may flow from the Highway Commission's proposed plan and purpose.

The structure through which it is proposed to make the underpass is a highway grade and has always been such since its construction. It is my opinion that no use of such highway grade by an irrigation district imposes any liability on the State or the Highway Department; and, therefore, until I am otherwise convinced, I shall advise the High-

way Commission that it may, without liability, use the Denver Avenue approach which is a highway grade for any use consistent with and which contributes to public travel and public convenience.

I don't want to appear arbitrary in this matter, but unless there is a clear liability resting on the Highway Commission it cannot use state highway funds for anything other than highway purposes and I have so advised the Commission.

Yours very truly,

J. M. DEVERS.

JMD:PW
cc: Henry F. Cabell,
C. B. McCullough,
G. S. Paxson,
H. G. Smith.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 18

F. T. YOUNG
Acting

October 30, 1942.

Mr. Jerry Kelly,
Engineer,
Kaiser Company,
Portland, Oregon.

Dear Sir:

Am handing you herewith specifications dated October 28, 1942, for the construction of the Den-

ver Avenue Housing Project Road Approaches to the Pacific Highway West (N. Denver Avenue).

Also, am furnishing you, for your guidance, a copy of Standard State Highway Specifications for Highway Construction, dated September 15, 1940, and Specifications and Contract Agreement for Highway Bridge Construction, dated August 1, 1939.

At a previous time, I have furnished you with the following:

Map of Road Layout into Project, Drawing 6B-6-4, dated October, 1942.

Standard Structure Plans, Drawing 2050.

Profiles of Road Approaches, dated October, 1942.

Standard Plans for Frame Trestle, Drawing 7586.

Preliminary Estimate of Quantities.

Plans for Underpass Structure, Drawings 7778 and 7779.

Typical Roadbed Sections, October, 1942.

Plan of Traffic Separators, September, 1942.

In accordance with our understanding, the State is to have an inspector on all work within the limits of the State Right of Way, or pertaining to Denver Avenue Crossing, Trestle Detour, and Approach Roads.

If, at any time, I can be of assistance to you personally, please feel free to call upon me.

Very truly yours,

F. T. YOUNG,
Acting Division Engineer.

FTY:IH—Encl.
cc: H. G. Smith.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 22

Oregon State Highway Commission
F. T. Young
Acting

November 16, 1942.

Mr. Jerry Kelly,
Room 136, Administration Building,
Kaiser Company, Inc.,
Swan Island,
Portland, Oregon.

Dear Sir:

Under separate cover, am mailing you two copies, each, of the profiles of approach roads, typical sections, and vicinity map, drawing 6B-6-4, all in connection with the proposed underground crossing to the Denver Avenue Housing Project.

Very truly yours,

F. T. YOUNG,
Acting Division Engineer.

FTY:IH
Encl.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 23

Permit

Whereas, Kaiser Company, Inc., and the Oregon Shipbuilding Corporation are engaged in the construction of ships and other facilities for the United States Government in or near Portland, Oregon, and in connection with said operations and activities large numbers of persons are employed; and

Whereas, existing housing accommodations and highway facilities are inadequate for the accommodation of the thousands of people employed by said corporations; and

Whereas, the Federal Public Housing Authority is engaged in the construction of a housing project (Project No. ORE-35053) for the use and accommodation of persons employed by the said corporations; and

Whereas, in connection with said housing project and in cooperation with the State Highway Commission there has been designed by the Highway Commission and is being constructed by the Federal Public Housing Authority a highway project which requires the construction of an underpass beneath Denver Avenue, which is a state highway under the jurisdiction of the State Highway Commission; and

Whereas, the State Highway Commission recognizes the urgent need of the early completion of said highway facilities, includng said underpass;

Now, Therefore, a permit is hereby granted to the Federal Public Housing Authority for the construction of an underpass within the right of way and beneath the roadbed of Denver Avenue, but subject, however, to the following conditions and provisions:

1. Said underpass shall be constructed at state highway engineer's station 66+90.66.

2. Said underpass shall have an unimpaired vertical clearance of fifteen feet and an unimpaired horizontal clearance of twenty-six feet for each traffic lane.

3. The structure and appurtenant facilities shall be built in accordance with plans, specifications and design prepared by the Highway Commission, copies of which, consisting of two sheets, are attached hereto and by this reference made a part hereof.

4. The State shall at its expense provide an inspector or inspectors who shall be present during the construction of said project and shall inspect and supervise the work.

5. The permitee may construct said underpass and appurtenant facilities with its own forces or by contract or such other method as may best suit the convenience of the permittee.

6. During construction the permittee shall cause proper and adequate protection to be maintained at all times for the safety of the members of the public using or having lawful occasion to be on or about Denver Avenue.

7. After said structure has been completed it shall be maintained by the State, but the permittee shall reimburse the State for all expenditures made in connection with such maintenance of the structure and appurtenant facilities within the state highway right of way; provided, however, that the permittee's obligation to maintain said structure or reimburse the State for its maintenance shall not extend beyond the duration of the war; and provided that reimbursements shall be for actual expenditures only, and in no event shall maintenance cover any part of the project which is outside of the state highway right of way.

8. By accepting this permit the permittee shall thereby assume the obligations herein specified.

Dated this 5th day of November, 1942.

OREGON STATE HIGHWAY COMMISSION.

By /s/ HARVEY F. CABELL,
Chairman;

By /s/ [Indistinguishable],
Commissioner;

By /s/ HERMAN OLIVER,
Commissioner.

Attest:

/s/ [Indistinguishable],
Secretary.

Approved:

/s/ [Indistinguishable],
State Highway Engineer.

Acceptance of Permit

The undersigned Federal Public Housing Authority hereby accepts the foregoing permit and assumes the obligations therein imposed on it and agrees to conform to the same.

Dated this 12th day of November, 1942.

FEDERAL PUBLIC HOUSING AUTHORITY,

By /s FRANK M. CRUTSINGER,
For the Federal Public Housing Commissioner.

JMD:PW

11/2/42.

EXHIBIT No. 24

August 25, 1943.

George H. Buckler, Contractor,
Attention Mr. Harold Goodland,
Lewis Building,
Portland, Oregon.

Dear Sirs:

Regarding furnishing clay blanket on dike, Denver Avenue:

I propose and agree to raise dike at entrance to Vanport to elevation of 34.3 and widen top to width of twelve feet, or as required, at the unit price of

$1.00 per cubic yard. This quotation is based on truck measure.

This quotation is for clay fill material furnished by me and in place on the dike with proper slopes, and top compacted with bulldozer.

Respectfully submitted.

FC/mby

8/25/43—Award. $50.00 extra for clearing. No grubbing.

George H. Buckler—Contractor
Portland, Oregon

Confirming

Requisition: No. 6234

Date: August 25, 1943.

To: Fred Christensen,
Address: 1017 S. E. 34th, Portland, Oregon.
Please Enter Our Order as Follows, Subject to

Conditions Below:

F. O. B.
Terms: Net

Ship to: George H. Buckler, Contractor,
704 Lewis Bldg.,
Portland, Oregon.

1. Cash discount period to be extended if necessary to return invoices for correction of errors, or

failure to submit required number of copies, by the time consumed in returning such invoices. Terms and discount rate to be shown on invoice.

2. The right to cancel this order is reserved if the material specified is not shipped at the time promised.

3. We will pay no extra charge for packing, loading or draying.

4. This order is placed subject to delays or cancellation occasioned by accident, strikes, fires or other causes beyond the control of either party.

5. All conditions of United States Statutes applicable to sales of merchandise for use on United States contracts must be complied with by the vendor.

6. In accepting this order, vendor agrees to the terms and conditions above.

Description	Amount
For the delivery in place of approximately 7000 cu. yds. of clay fill material, to meet with the approval of the U. S. Army Engineers. To place material as per plan. Price to be $1.00 per cubic yard, truck measure.	
Add the sum of $50.00 for clearing necessary brush at toe of slope.	
All materials to be placed twenty (20) days after notice is given to start.	
Estimated amount for F.P.H.A. purposes only	$8,500.00

300.8h, Additional Work.

Approved:.....
F.P.H.A.

4 copies of all invoices must be submitted referring to the requisition No. Original must have signed certification.

Mail All Invoices in Quadruplicate to: George H. Buckler—Contractor, 704 Lewis Bldg., Portland, Oregon.

Invoices must state order number and point of delivery.

Prices on this order not subject to change.

In accepting this order, seller agree to pay all industrial insurance and unemployment compensation taxes.

GEORGE H. BUCKLER,
Contractor.

By /s/ J. W. WEILER.

George H. Buckler—Contractor
704 Lewis Building
Portland, Oregon

September 26, 1943.

Gentlemen:

Our work in connection with F.P.H.A. Housing Project, ORE-35053B, located at Vanport City, Oregon, is now completed.

The accounting section of the F.P.H.A. has requested that final claims for reimbursement for all material, supplies and services purchased through our firm be filed not later than October 10, 1943.

Therefore, if you have any unpaid claims pertinent to the above referred to project, it is requested that you mail us detailed statements therefore, in quadruplicate, to reach us not later than October 10, 1943.

Failure to receive a statement from you by that date will indicate that any and all claims for your account have been paid in full, and we will be governed accordingly.

Very truly yours,

GEORGE H. BUCKLER,
Contractor.

By /s/ J. W. WEILER,
Field Auditor.

WTR:el

[Endorsed]: August 5, 1953.

EXHIBIT No. 25

(Copy)

Fred Christensen
Contractor
1017 S. E. 34th Avenue
Portland 15, Oregon

Sept. 25, 1943.

In Account With

George H. Buckler—Contractor,
704 Lewis Building,
Portland, Oregon.

Your Order No.: 6234.
Inv. No.: B-4240.
Job Location: Dike at entrance to Vanport.

Items	Quantity	Rate	Amount
Clay fill in place	8425 yds.	1.00	8,425.00
Clearing			50.00
			8,475.00

I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transaction have been complied with; and that State or local taxes are not included in the amounts billed.

.....,
Owner.

Paid 10/19/43.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 26

[Endorsed]: Filed August 5, 1953.

In the County Court of the State of Oregon
for the County of Multnomah

No. 34

In the Matter of:

THE ORGANIZATION OF PENINSULA DRAINAGE DISTRICT NUMBER TWO

ORDER ORGANIZING DISTRICT

Sept. 24, 1917.

At this time, in accordance with the order of the court heretofore made, comes on to be heard the petition in the matter of the organization of Drainage District No. Two, of R. H. Brown, C. C. Colt, B. C. Darnall, Kenwood Land Company (a corporation), R. W. Schmeer, A. M. Wright, Columbia Valley Trust Company (a corporation), Merchants Loan & Investment Company (a corporation), Peninsula Industrial Company (a corporation), Riverton Land Company (a corporation), Swinton Land Company (a corporation), Portland Trust Company of Oregon (a corporation), L. G. Sontag, B. E. Cameron, R. M. Walton and J. W. Hill, all the said petitioners appearing in open court by Carey and Kerr, their attorneys, and upon the objections to the organization of the said district made and filed by Green C. Love and Leonard

Exhibit No. 26—(Continued)

Gertz, and it appearing to the satisfaction of the Court that in accordance with the order, due and legal notice of the hearing of the said petition has been given and published in the manner required by law, by the County Clerk of Multnomah County, by publication of such notice, together with copy of the petition aforesaid, once each week for four successive weeks in The Daily Record-Abstract, a newspaper published in Multnomah County, Oregon, in which are situate the lands of the proposed drainage district, to wit, from the 9th day of August, 1917, to the 6th day of September, 1917, inclusive; and that the last insertion and publication thereof was more than fifteen days prior to the time for this hearing of the said petition, and due proof of the publication aforesaid has been filed; and the court being satisfied that the notice and proof thereof is in all respects regular and in accordance with the law, and that this Court has original and exclusive jurisdiction of the said drainage district and of the said proceedings, and that no person other than said Love and said Gertz has objected to the organization or incorporation of the said drainage district, and at this time the petitioners having presented the said petition and evidence in support thereof, and the said Love and the said Gertz having also appeared and offered evidence against the petition, and the Court being satisfied after due consideration, that the said Peninsula Drainage District Number Two should be

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organized and the petition should be allowed, and the prayers of the petitioners should be granted; and that said objections should be overruled;

The Court therefore finds that the petition is in due form and it contains the allegations sufficient and necessary to confer jurisdiction, and also makes its findings upon the facts alleged in the petition and other facts necessary and proper for the determination of the propriety of the organization of the said district, which are as follows:

1. The boundary lines of the said district and a description of all lands included therein are as follows:

Beginning at the northeast corner of John Switzler donation land claim in section two (2), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south along the east line of John Switzler donation land claim 1422 feet to the center line of McBride Slough; thence following center line of McBride Slough, more definitely described by following meanders: north 75° 30′ east 300 feet, south 44° 50′ east 1018.9 feet, south 18° 37′ east 921.3 feet, south 25° 37′ west 400 feet, south 15° 57′ west 800 feet, south 37° 43′ west 300 feet, south 40° 05′ west 700 feet, south 50° 25′ west 300 feet, south 52° 23′ west 200 feet, south 44° 25′ west 200 feet, south 40° 31′ west 99.8 feet, south 34° 30′ west 288 feet, south 19° 26′ west 200 feet, south 9° 7′ west 430 feet, to the intersection of McBride

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Slough with Columbia Slough; thence down stream and westerly following along low water line of Columbia Slough more definitely described in the following meanders: south 56° 10′ west 147.4 feet, south 69° 45′ west 107 feet, south 75° 14′ west 450 feet, north 84° 11′ west 58 feet, south 88° 53′ west 240 feet, north 67° 58′ west 1327.7 feet to the northeast corner of Lewis Love donation land claim, north 61° 37′ west 1878.9 feet to the center line of Love Slough; north 83° 51′ west 399.6 feet, south 71° 37′ west 102.2 feet, south 39° 30′ west 630 feet, south 66° 07′ west 200 feet, north 78° 11′ west 335 feet, north 58° 45′ west 942.8 feet, north 68° 12′ west 268.7 feet, south 63° 26′ west 615 feet, north 56° 50′ west 776.5 feet, north 68° 12′ west 538.5 feet, north 80° 33′ west 608.3 feet, north 78° 40′ west 369.0 feet, north 62° 56′ west 1000.0 feet more or less to the east line of the right of way of the Derby Street approach to the Interstate Bridge; thence northerly and easterly following along the east line of said right of way, 450 feet along a 6° curve to the right whose chord bears north 8° 30′ east, thence still following along the east line of said right of way north 11° 32′ east 5290.0 feet to its intersection with the west line of the right of way of the Union Avenue approach to the Interstate Bridge, thence continuing north 11° 32′ east across the Union Avenue approach 150 feet more or less to the east line of the right of way of Union Avenue approach, thence following along the east

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line of right of way of Union Avenue approach 300 feet more or less to the north line of G. W. Force donation land cliam; thence south 71° east along the north line of said claim 464.8 feet south 70° east 574.2 feet to the northwest corner of J. R. Switzler donation land claim; thence south 71° east 3320.0 feet to the northwest corner of John Switzler donation land claim; thence south 79° 50′ east 778½ feet to the northwest corner of that half acre tract owned by Portland Railway Light & Power Company, thence south 87° 47′ east 150 feet to low water line of Columbia River, thence following along the low water line of Columbia River south 78° east 1750 feet, north 76° 54′ east 386.9 feet, north 85° east 156 feet, south 89° east 115 feet, east 1150 feet, south 87° east 770 feet to the east line of John Switzler donation land claim; thence south 164 feet more or less to point of beginning, containing 1519.3 acres.

All of the above-described lands constitute a contiguous body of swamp, wet and overflowed lands.

2. The total acreage included in the said lands and to be included in the district aforesaid is fifteen hundred nineteen and three-tenths (1519.3) acres, and the said land lies wholly within Multnomah County, Oregon.

3. The names of the owners of the above-described land to be included in the said district, as shown by the records of the County of Multnomah,

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and the acreage owned by each of such owners, respectively, are as follows:

(1) R. H. Brown is the owner of the following-described land:

Beginning at a point on the west line of the Jos. R. Switzler donation land claim 1039.5 feet from the southwest corner of said claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north 0° 24′ east along the west line of said claim line 1700 feet; thence south 71° east 3280.0 feet more or less to the east line of claim; thence south along east claim line 1160.0 feet more or less; thence north 71° 56′ west 1800.0 feet to an iron pipe on south shore of Force Lake; thence along south shore of lake as follows: South 89° 16′ west 164.7 feet, north 58° west 198.0 feet; south 82° 30′ west 297.0 feet, south 72° west 339.0 feet and north 87° west 462.0 feet to point of beginning, subject to the rights of the public in the highway known as Union Avenue approach to the Interstate Bridge, the tract herein described, after deducting the area so excepted, containing 90.2 acres.

(2) C. C. Colt is the owner of the following-described land:

Beginning at a point on the west line of the Jos. R. Switzler donation land claim 4339.5 feet from the southwest corner of said claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north 0° 24′

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east along the west line of said claim 1600 feet more or less to the northwest corner of said claim; thence south 71° east 3320.0 feet more or less, to the northeast corner of said claim; thence south along the east line of claim line 9.2 feet to the north line of River Boulevard of Bridgeton; thence along the north side of River Boulevard as follows: North 77° 31′ west 637.0 feet; thence north 73° 31′ west 730.11 feet to the east side of the Portland Railway Light & Power Company's right of way; thence south 21° 0.5′ east along the right of way 331.2 feet; thence along the south line of Bridgeton as follows: south 77° 31′ east 52.2 feet, south 12° 29′ west 25 feet, south 77° 31′ east 245 feet, south 12° 29′ west 50 feet, south 77° 31′ east; thence 635.0 feet north 12° 29′ east 25 feet, south 77° 31′ east 145.0 feet, north 12° 29′ east 25 feet, south 77° 31′ east 156.8 feet to the east line of Jos. R. Switzler donation land claim; thence south along the east line of said claim 1336.6 feet more or less; thence north 71° west 3300 feet more or less to point of beginning, subject to the rights of the public in the highway known as Union Avenue approach to the Interstate bridge and the right of way of the Portland Railway Light and Power Company mentioned below, the tract herein described, after deducting the area so excepted, containing 98 acres.

(3) B. C. Darnall is the owner of the following-described land:

Beginning at a point on the west line of the Jos.

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R. Switzler donation land claim 2739.5 feet from the southwest corner of said claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon, thence north 0° 24′ east along the west line of said claim 1600 feet; thence south 71° east 3300 feet more or less to the east line of said claim, thence south along the east line of claim 1600 feet, thence north 71° east 3280 feet more or less to point of beginning, subject to the rights of the public in the highway known as Union Avenue approach to the Interstate bridge and the right of way of the Portland Railway Light and Power Company mentioned below, the tract herein described, after deducting the area so excepted, containing 105.8 acres.

(4) E. F. Day is the owner of the following-described land:

Beginning at the northwest corner of the Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon, said point being also northeast corner of J. Rankin donation land claim; thence north 89° 55¼′ west along the north line of J. Rankin donation land claim 9.75 chains; thence north .03 chains; then south 89° 55¼′ east 281.16 feet; thence north 1232.36 feet to the south margin of Force Lake; thence along meanders of lake south 66° east 277.7 feet, south 80° east 3.7 chains to the west line of Jos. R. Switzler donation land claim; thence south 0° 24′ west 17.25 chains to the south-

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west corner of Jos. R. Switzler donation land claim; thence north 71° 37′ west 130.58 feet to point of beginning, containing 13 acres.

Also Beginning at a point on the north line of J. Rankin donation land claim which bears north 89° 55¼′ west 9.45 chains distant from the northeast corner of the J. Rankin donation land claim, section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 400 feet more or less to low water line of Columbia Slough; thence westerly along the low water line of Columbia Slough to a line which running north .0° 01¼′ west and south .0° 01¼′ east is 467.6 feet west of the point of beginning; thence north .0° 01¼′ east 360 feet more or less to north line of the J. Rankin donation land claim; thence south 89° 55¼′ east along the J. Rankin donation land claim 467.6 feet to point of beginning, containing 3.7 acres.

(5) Leonard Gertz is the owner of the following-described land:

Beginning at a point on the north line of Perry Baker donation land claim and center line of that slough known as McBridge Slough, said point being 16 chains east of the northeast corner of Perry Baker donation land claim in section two (2), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence following along the center line of McBride Slough south 18° 37′ east 670 feet, south 25° 37′ west 400 feet, south 15° 57′ west 800 feet, south 37° 43′ west 300 feet, south 40° 05′ west

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700 feet, south 50° 25′ west 300 feet, south 52° 23′ west 200 feet, south 44° 25′ west 200 feet, south 40° 31′ west 99.8 feet, south 34° 30′ west 288 feet, south 19° 26′ west 200 feet, south 9° 7′ west 430 feet, to the intersection of Columbia Slough; thence southerly and westerly along the low water line of Columbia Slough to the north line of Wm. McClung donation land claim; thence north 79° west along the north line of Wm. McClung donation land claim to a point 2.8 chains west of the center line of section 11; thence north .0° 5′ east 5508.7 feet to the southeast corner of block 21, Bridgeton; thence north .0° 5′ east along the east line of block 21, 358.29 feet more or less to a point 25 feet south of the high bank of Columbia River; thence easterly and up stream 25 feet south of the high bank to the west line of Sarah Wilson donation land claim, said line being 1657.7 feet east of the east line of block 21, Bridgeton; thence south along the west line of Sarah Wilson donation land claim 1287 feet more or less to the center line of McBride Slough; thence following the center line of McBride Slough north 75° 30′ east 300 feet, south 44° 50′ east 1018.9 feet, south 18° 37′ east 251.3 feet to point of beginning, containing 300 acres.

(6) Kenwood Land Company (a corporation) is the owner of the following-described land:

Beginning at a point on the north line of John Rankin donation land claim said point being north 89° 55¼′ west 1090.98 feet of the northeast corner of John Rankin donation land claim in section ten

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(10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north 1101.24 feet to the center line of Force Lake; thence following along the center line of Force Lake south 77° 21′ west 531 feet, south 39° 32′ west 2.7 chains, south 49° 38′ west 2.6 chains, west 2 chains; thence south 52° 42′ west to the east line of the Derby Street approach to the Interstate bridge; thence southerly following along the east line of the Derby Street approach 450 feet more or less to low water line of Columbia Slough; thence southerly and easterly along low water line of Columbia Slough to a line which running south 0° 1¼′ east and north 0° 1¼′ west is 467.6 feet west of the point of beginning; thence north 0° 1¼′ west 145 feet more or less to north line of John Rankin donation land claim; thence south 89° 55¼′ east 467.61 feet to point of beginning, containing 19 acres.

(7) Hazel King, William King, Thelma Shepard, James Shepard, Pearl Shepard, a minor, and H. H. Northup, as guardian of Pearl Shepard, a minor, are the owners of the following-described land:

Beginning at the northwest corner of the Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 71° 37′ east 130.58 feet to the southwest corner of Joseph R. Switzler donation land claim; thence north 0° 24′ east along

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west line of Joseph R. Switzler donation land claim 1039.5 feet, to the south margin of Force Lake; thence along the meanders of lake south 87° east 462 feet; north 72° east 266.7 feet; thence south 2050 feet more or less to the low water line of Columbia Slough; thence northerly and westerly along low water line of Columbia Slough to the west line of Lewis Love donation land claim; thence north following the west line of Lewis Love donation land claim 500 feet more or less to point of beginning, containing 30 acres.

(8) Green C. Love is the owner of the following-described land:

Beginning at a point which is 1678.6 feet east 984.6 feet north of the northwest corner of Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 71° 56′ east 793.11 feet; thence south 2100 feet more or less to the low water line of Columbia Slough; thence northerly and westerly following along the low water line of Columbia Slough to a point which is 1678.6 feet east of the west line of Lewis Love donation land claim; thence north 1860 feet more or less to point of beginning, containing 34.4 acres.

(9) Merchants Loan & Investment Company (formerly Merchants Loan & Trust Company), a corporation, is the owner of the following-described land:

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Beginning at the northeast corner of the J. Rankin donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south along the east line of the J. Rankin donation land claim 500 feet more or less to low water line of Columbia Slough; thence northerly and westerly along low water line of Columbia Slough to a point 4.725 chains west of the east line of the J. Rankin donation land claim; thence north 400 feet more or less to the north line of the J. Rankin donation land claim; thence south 89° 55¼′ east 4.725 chains to point of beginning, containing 2.9 acres.

(10) Peninsula Industrial Company, a corporation, is the owner of the following-described lands:

Beginning at the northeast corner of John Switzler donation land claim in section two (2), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence north 164 feet more or less to low water line of Columbia River; thence westerly and down stream following the low water mark of Columbia River, north 87° west 770 feet, west 1150 feet, north 89° west 115 feet, south 85° west 156 feet, south 76° 54′ west 286.9 feet, north 78° west 1750 feet, to the northeast corner of that half acre tract owned by the Portland Railway Light & Power Company; thence south 19° 53′ west 45 feet more or less to the north side of River Boulevard, Bridgeton; thence southerly and easterly

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following along the north line of River Boulevard to the east line of Bridgeton; thence easterly along the high bank of Columbia River to the east line of John Switzler donation land claim; thence north along claim line 115 feet more or less to point of beginning, containing 21 acres.

Also Beginning at a point on the west line of John Switzler donation land claim and the south line of block 6, Bridgeton, which point is 263.4 feet south of the northwest corner of John Switzler donation land claim in section three (3), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence southerly and easterly along the south boundary line of Bridgeton to the southeast corner of block 21, Bridgeton, which point is also south 0° 5′ west 381.09 feet from the northwest corner of Leonard Gertz tract; thence south 0° 5′ west 5890 feet more or less to the north line of William McClung donation land claim; thence north 79° west along the north line of William McClung donation land claim 400 feet more or less to low water line of Columbia Slough; thence northerly and westerly following low water line of Columbia Slough to the intersection of Columbia Slough with the center line of that slough known as Love Slough; thence along center line of Love Slough north 18° 10′ west 248.5 feet, north 21° east 590 feet, north 19° west 430 feet; thence north 72° west 224.4 feet; thence north 71° 56′ west 527.6 feet to the west line of John Switzler donation land claim; thence north along the west line of John Switzler

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donation land claim 4096.6 feet more or less to point of beginning, subject to the right of way of the Portland Railway Light & Power Company mentioned below, the tract herein described, after deducting the area so excepted, containing 430.9 acres.

Also Beginning at a point on the west line of Joseph R. Switzler donation land claim and center line of Force Lake which point is north 0° 24′ east 30.11 chains from the southwest corner of Joseph R. Switzler donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence following along the center line of Force Lake south 89° 16′ west 3.6 chains, south 55° 52′ west 6.8 chains, south 30° 20′ west 3 chains, south 40° 16′ west 5.6 chains, south 49° 38′ west 2.5 chains, south 77° 21′ west 10 chains, south 39° 32′ west 2.7 chains, south 49° 38′ west 2.6 chains, west 2 chains; thence south 52° 42′ west to the east line of Derby Street approach; thence north 11° 32′ east along the east line of Derby Street approach 5290.0 feet to its intersection with the west line of the right of way of the Union Avenue approach to the Interstate Bridge, thence continuing north 11° 32′ east across the Union Avenue approach 150 feet more or less to the east line of the right of way of Union Avenue approach, thence following along the east line of right of way of Union Avenue approach 300 feet more or less to the low water line of North Portland Harbor; thence southerly and easterly following along low water line to northwest corner of Joseph R. Switzler

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donation land claim; thence south 0° 24′ west along the west line of Joseph R. Switzler donation land claim 3952.3 feet more or less to point of beginning, subject to the rights of the public in the highway known as the Union Avenue approach to the Interstate Bridge, the tract herein described, after deducting the area so excepted, containing 163.7 acres.

(11) Portland Railway Light & Power Company (a corporation), is the owner of the following-described land:

Beginning at a point which is south 79° 50′ east 778.5 feet from the northwest corner of John Switzler donation land claim in section three (3), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 19° 53′ west 150 feet to an iron pipe; thence 87° 47′ east 149.86 feet to an iron pipe; thence north 19° 53′ east 150 feet; thence north 87° 47′ west 149.86 feet to point of beginning, containing 5/10 of an acre.

Also a right of way described as follows:

(a) A strip of land 30 feet in width being 15 feet on each side and parallel with the center line thereof. Beginning at the quarter corner between sections ten (10) and eleven (11) in township one (1) north, range one (1) east, Willamette Meridian, thence north 411 feet to a point which is also north 71° 56′ west 1304.5 feet from the northeast corner of the Lewis Love donation land claim, thence westerly following a curve to the left having a radius of 716.8 feet a distance of 100 feet more or

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less to the center line of the right of way and low water line of the north bank of Columbia Slough, which point is the point of beginning of land to be described.

Beginning at the above said point, thence westerly following a curve to the left having a radius of 716.8 feet, a distance of 169.2 feet to a point; thence tangent with said curve and north 21° 05′ west following along the center line of the present right of way 2262.2 feet more or less to a point in the line between the lands formerly owned by Alice M. Tomasini and Geo. W. Force, containing 2.2 acres.

(b) A strip of land 70 feet in width being 35 feet on each side and parallel with the center line thereof. Commencing at the above said point in the line between the lands formerly owned by Alice M. Tomasini and Geo. W. Force, thence continuing along the same center line north 21° 05′ west 4612.3 feet more or less to a point in the center of the present Portland Railway Light & Power Company's right of way and the north boundary line of the J. R. Switzler donation land claim, containing 7.4 acres.

(12) Riverton Land Company (a corporation) is the owner of the following-described land:

Beginning at a point which is 2432.6 feet east and 733.7 feet north of the northwest corner of Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Wil-

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lamette Meridian, Oregon; thence south 71° 56′ east 1357.67 feet; thence south 72° east 224.4 feet to the center line of that slough commonly known as Love Slough; thence following along the center line of slough south 19° east 430 feet; thence south 21° west 590 feet; thence south 18° 10′ east 248.5 feet to the intersection of Love Slough and Columbia Slough; thence following along the low water mark of Columbia Slough north 83° 51′ west 399.16 feet, south 71° 37′ west 102.3 feet, south 39° 30′ west 630 feet, south 66° 07′ west 200 feet, north 78° 11′ west 335 feet, north 58° 45′ west to a point 2432.6 feet east of the west line of Lewis Love donation land claim; thence north 2100 feet more or less to point of beginning, subject to the rights of the public in the highways known as the Union Avenue approach and the Vancouver Avenue approach to the Interstate Bridge, and the right of way of the Portland Railway Light & Power Company mentioned above, the tract herein described, after deducting the area so excepted, containing 57.45 acres.

(13) R. W. Schmeer and A. M. Wright are the owners of the following-described land:

Beginning at a point on the south margin of Force Lake which point bears north 1252.15 feet and north 89° 55¼′ west 362.3 feet from the northeast corner of John Rankin donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence following along the meanders of lake north 66° west

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78.71 feet south 10° west 132 feet, south 78° west 138.6 feet, south 34° west 369.6 feet, south 60° west 132 feet, south 82° west 179.06 feet; thence north 374.2 feet to center line of Force Lake; thence following center line of Force Lake north 77° 21′ east 129 feet; north 49° 38′ east 2.5 chains, north 40° 16′ east 5.6 chains, north 30° 20′ east 3 chains, north 55° 52′ east 167.6 feet; thence south 432.8 feet to point of beginning, containing 6.6 acres.

Also Beginning at a point on the west line of Joseph R. Switzler donation land claim on the south margin of Force Lake which point is north 0° 24′ east 17.25 chains from the southwest corner of Joseph R. Switzler donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence along the south margin of Force Lake north 80° west 3/7 chains, north 66° west 277.7 feet; thence north 532.8 feet to center line of Force Lake; thence along the center line of Force Lake north 55° 52′ east 281.2 feet; north 89° 16′ east 3.6 chains to west line of Joseph R. Switzler donation land claim; thence south 0° 24′ west along the west line of Joseph R. Switzler donation land claim 848.76 feet to point of beginning, containing 8.2 acres.

(14) F. Stenzel is the owner of the following-described land:

Beginning at a point on the north line of J. Rankin donation land claim which bears north 89° 55¼′ west 4.725 chains distant from the northeast

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corner of J. Rankin donation land claim in Section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence south 400 feet more or less to low water line of Columbia Slough; thence westerly along the low water line of Columbia Slough to a point which is 9.45 chains west of the east line of J. Rankin donation land claim; thence north 400 feet more or less to north line of J. Rankin donation land claim; thence south 89° 55¼′ east 4.725 chains to point of beginning, containing 2.8 acres.

(15) Swinton Land Company (a corporation) is the owner of the following-described land:

Beginning at a point in the meander line on the south margin of Force Lake which point is 846.5 feet east and 1062.7 feet north of the northwest corner of the Lewis Love donation land claim in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, Oregon; thence along the meanders of Force Lake north 72° east 63.3 feet, north 82° 30′ east 297 feet, south 58° east 198 feet, north 89° 16′ east 164.7 feet; thence south 71° 56′ east 176.82 feet; thence south 1860 feet more or less to the low water line of Columbia Slough; thence westerly along the low water line of Columbia Slough to a point 846.5 feet east of the west line of Lewis Love donation land claim; thence north 2050 feet more or less to point of beginning, containing 38.1 acres.

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(16) Edwin G. MacGrouther is the owner of the following-described land:

Lot one (1), Chambreau's Factory Site Add. to the City of Portland, Multnomah County, State of Oregon, as shown by the recorded plat thereof, containing 1.14 acres.

(17) Columbia Valley Trust Company (a corporation) is the owner of the following-described land:

Lots two (2) to nineteen (19), inclusive, Chambreau's Factory Site Add. to the City of Portland, Multnomah County, State of Oregon, as shown by the recorded plat thereof, containing 15.24 acres.

(18) Wm. J. Tippins is the owner of the following-described land:

East thirty-one (31) feet of lot one (1), block one (1), and lot one (1), block three (3), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.102 acres.

(19) R. T. Driskill and Hattie Driskill are the owners of the following-described land:

Lots six (6) and seven (7), block one (1), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.127 acres.

(20) Gertrude Weston is the owner of the following-described land:

Lot one (1), block two (2), Bridgeton, Multno-

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mah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(21) C. E. Taylor is the owner of the following-described land:

Lot two (2), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(22) Minnie Schweitzer is the owner of the following-described land:

Lots three, four and five (3, 4 & 5), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.17 acres.

(23) Myrtle M. Tracy is the owner of the following-described land:

Lot six (6), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.055 acres.

(24) W. E. Strauhl is the owner of the following-described land:

Lots seven and eight (7 & 8), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.11 acres.

(25) Jessie Merz Manas, Jeannette Merz Manas, Jessie Merz Manas, as Administratrix of the Estate of Henry Merz and the Estate of Henry Merz, deceased, are the owners of the following-described land:

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Lots nine (9) and eleven (11), block two (2), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(26) M. E. Herrick is the owner of the following-described land:

Lot seven (7), block three (3), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.055 acres.

(27) J. N. Hoffman is the owner of the following-described land:

Lots one (1) and two (2), block four (4), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(28) Carl Oscar Nilsson and Ida Nilsson are the owners of the following-described land:

Lots three (3) to six (6), inclusive, block four (4), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.23 acres.

(29) R. H. Tennison is the owner of the following-described land:

Lots seven and eight (7 & 8), block four (4), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(30) Geo. N. Spencer is the owner of the following-described land:

Lots three (3) and four (4), block five (5),

Exhibit No. 26—(Continued)

Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(31) Mary E. Barden is the owner of the following-described land:

Lot seven (7), block five (5), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(32) B. L. Woodworth is the owner of the following-described land:

Lot eight (8), block five (5), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(33) Portland Trust Company of Oregon (formerly Portland Trust & Savings Bank), a corporation, and Mrs. Linda Iola Ford are the owners of the following-described land:

Lots one and two (1 & 2), block six (6), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(34) B. E. Cameron is the owner of the following-described land:

Lot eight (8), block six (6), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(35) Alma Walton and R. M. Walton are the owners of the following-described land:

Lot one (1), block seven (7), Bridgeton, Multno-

Exhibit No. 26—(Continued)

mah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(36) Mary Ellen Sullivan is the owner of the following-described land:

Lot three (3), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(37) Mary Ellen Sullivan and Arthur W. Sullivan are the owners of the following-described land:

Lot four (4), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(38) Sara M. Sullivan is the owner of the following-described land:

Lot five (5), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(39) Sara M. Sullivan and Timothy W. Sullivan are the owners of the following-described land:

Lot six (6), block seven (7), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.06 acres.

(40) J. W. Hill is the owner of the following-described land:

Lots seven (7) and eight (8), block seven (7),

Exhibit No. 26—(Continued)

Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(41) David Galet is the owner of the following-described land:

Lots one and two (1 & 2), block eight (8), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(42) Louie G. Sontag is the owner of the following-described land:

Lots three (3) to six (6), inclusive, nine (9) and ten (10), block eight (8), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.345 acres.

(43) Wm. J. McClure is the owner of the following-described land:

Lots three and four (3 & 4), block ten (10), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.115 acres.

(44) District School Board of District No. 33, Multnomah County, Oregon, is the owner of the following-described land:

Lots nine (9) to sixteen (16), inclusive, block fifteen (15), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 0.91 acres.

(45) Wm. A. Cowles is the owner of the following-described land:

Exhibit No. 26—(Continued)

Lots one and two (1 & 2), block twenty-one (21), Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof containing 0.15 acres.

(46) Portland Trust Company of Oregon (formerly Portland Trust & Savings Bank), a corporation, is the owner of the following-described land:

Lot one (1) except the east thirty-one (31) feet thereof, and all of lots two (2) to five (5), inclusive, and eight (8) to eleven (11), inclusive, block one (1); lots ten (10) and twelve (12) to eighteen (18), inclusive, block two (2); lots two (2) to six (6), inclusive, and eight (8) to twenty (20), inclusive, block three (3); lots nine (9) to twenty (20), inclusive, block four (4); lots one (1), two (2), five (5), six (6) and nine (9) to nineteen (19), inclusive, block five (5); lots three (3) and four (4) to seven (7), inclusive, and nine (9) to sixteen (16), inclusive, block six (6); lot two (2), block seven (7); lots nine (9) to eighteen (18), inclusive, block seven (7); lots seven (7), eight (8) and eleven (11) to twenty-six (26), inclusive, block eight (8); lots one (1) to thirty (30), inclusive, block nine (9); lots one (1), two (2) and five (5) to thirty-one (31), inclusive, block ten (10); lots one (1) to thirty-two (32), inclusive, block eleven (11); lots one (1) to thirty-two (32), inclusive, block twelve (12); lots one (1) to thirty-two (32), inclusive, block thirteen (13); lots one (1) to thirty-two (32), inclusive, block fourteen (14); lots one (1) to eight

Exhibit No. 26—(Continued)

(8), inclusive, and seventeen (17) to thirty-two (32), inclusive, block fifteen (15); lots one (1) to thirty-four (34), inclusive, block sixteen (16); lots one (1) to thirty-four (34), inclusive, block seventeen (17); lots one (1) to thirty-two (32), inclusive, block eighteen (18); lots one (1) to thirty-one (31), inclusive, block nineteen (19); lots one (1) to thirty (30), inclusive, block twenty (20); lots three (3) to eleven (11), inclusive, block twenty-one (21); lots one (1) to eight (8), inclusive, block twenty-two (22); lots one (1) to ten (10), inclusive, block twenty-three (23); lots one (1) to fourteen (14), inclusive, block twenty-four (24); lots one (1) to fourteen (14), inclusive, block twenty-five (25); lots one (1) to fifteen (15), inclusive, block twenty-six (26); all in Bridgeton, Multnomah County, Oregon, according to the recorded plat thereof, containing 31.13 acres.

4. There is included in the said district the dedicated streets and roads in Chambreau's Factory Site Add. to the city of Portland and in Bridgeton, as shown by the plats thereof, and the railroad right of way of the Portland Railway, Light & Power Company hereinbefore described, and also the highways described as follows:

(1) Union Avenue Approach to the Interstate Bridge: A strip of land 80 feet in width being 40 feet on either side of the present center line of the Union Avenue Approach described as follows:

(a) Beginning at a point in the north line of

Exhibit No. 26—(Continued)

the land owned by the Riverton Land Company in section 10, township 1 north, range 1 east, Willamette Meridian, which is described in book 454, page 354, record of deeds for Multnomah County, Oregon, which point is south 71° 56′ east 765 feet more or less measured along the said north line from the intersection of the said north line and the east and west line between section 10 and section 3, township 1 north, range 1 east, Willamette Meridian, thence south 22° 12′ east 1600.0 feet more or less to the low water line of the north side of Columbia Slough, containing 2.93 acres.

(b) A strip of land 40 feet on each side of a center line described as follows:

Beginning at a point in the center line of the present Union Avenue approach to the Interstate Bridge and the north line of the land owned by the Riverton Land Company in section 10, township 1 north, range 1 east, Willamette Meridian, which is described in book 454, page 354, record of deeds for Multnomah County, Oregon, which point is south 71° 56′ east 765 feet more or less measured along the said north line from the intersection of the said north line and the east and west line between section 10 and section 3, township 1 north, range 1 east, Willamette Meridian; thence north 22° 12′ west 1810 feet; more or less along the present center line of fill; thence on a 3° curve to the left 717 feet; thence north 43° 42′ west 3889.0 feet more or less along the present center line of fill; thence on a curve of 13° to the right 200 feet more or less until it inter-

Exhibit No. 26—(Continued)

sects the east line of right of way of the Derby Street approach produced, containing 12.3 acres.

(2) Vancouver Avenue approach to the Interstate Bridge: A strip of land 20 feet in width being 10 feet on each side and parallel therewith, and being the center line of the present pile trestle being part of the old Vancouver road, and now known as the Vancouver Avenue approach to the Interstate Bridge. Commencing at a point on the low water line on the north bank of the Columbia Slough which point is 487.6 feet south and 356.7 feet west of the southwest corner of the John Switzler donation land claim situated in section 10 of township 1 of range one east, Willamette Meridian, Oregon, and running thence north 10° 42′ east 1558.4 feet more or less to its intersection with the westerly line of right of way of the Union Avenue approach to the Interstate Bridge, containing .72 acres.

The total acreage of all of said streets and highways and said railroad right of way is 41.77 acres, and the same will not be beneficially affected by the proposed improvement. All of the other lands in the said district above described and to be included in the said proposed district are and should be properly included therein and will be beneficially affected by the operation of the proposed district.

5. The said district is to be organized for the construction, operation and maintenance of a drainage system and the reclamation of the said lands

Exhibit No. 26—(Continued)

and the protection thereof from overflow of the Columbia River and the Columbia Slough, and the proposed reclamation and protection aforesaid is for both sanitary and agricultural purposes, and will be conducive to the public health and welfare and will be of public utility and benefit.

6. The benefits of such proposed reclamation and protection will exceed the damage to be done, and the best interests of the land aforesaid to be included in the district and of the owners of such land as a whole, and of the public at large, will be promoted by the formation and proposed operations of such district.

7. The formation of a drainage district under the provisions of the laws of Oregon is a proper and advantageous method of accomplishing the reclamation and protection of the lands aforesaid to be included therein.

8. The proposed plan of reclamation and protection is to provide, where necessary, proper and suitable dikes to prevent the overflow of the Columbia River and Columbia Slough, and to drain the lands by ditches or otherwise, supplementing the said works by pumping plants or other methods of affording drainage and protection as may be best suited to accomplish the purpose. The said lands in general are bottom lands lying between the Columbia Slough and the Columbia River, which said slough is a tributary of and connected with the Columbia River. The said lands are partly pro-

Exhibit No. 26—(Continued)

tected from overflow by dikes upon or near the boundaries thereof, and the proposed plan will include such additional dikes and works as will be deemed necessary.

9. All of the petitioners have agreed that they will pay any and all expenses incurred and any tax or taxes that may be levied against their lands, respectively, for the purpose of paying the expense of organizing or attempting to organize the proposed district.

It Is Therefore Ordered, Declared and Decreed, that the said Peninsula Drainage District Number Two shall be organized and created, and shall include each and all of the parcels of land herein described and described in the said petition, and as particularly described by metes and bounds in finding numbered one herein, said area consisting of fifteen hundred nineteen and 3/10 (1519.3) acres, more or less.

It Is Further Ordered that the county clerk within thirty days after this date, proceed to call a meeting of the owners of the land situate in the said district, for the purpose of electing a board of three supervisors thereof, and shall give notice thereof in the manner prescribed by law.

Dated September 24, 1917.

/s/ GEORGE TAGWELL,
County Judge.

EXHIBIT No. 27

No. 34

REPORT OF PHILIP H. DATER

Chief Engineer, to the Board of Supervisors of Peninsula Drainage District Number Two. Dated November 5th, 1917.

This report approved and adopted by the Board of Supervisors of Peninsula Drainage District Number Two at its meeting held November 9, 1917.

/s/ R. H. BROWN,
Secretary, Board of
Supervisors.

Portland, Oregon.
November 5, 1917.

To the Board of Supervisors,
Peninsula Drainage District No. 2,
North Portland, Oregon.

Gentlemen:

Herewith in compliance with instructions, I submit Engineers Report on the Drainage and Reclaiming of lands in the above-mentioned Drainage District, setting forth the interior drainage system necessary to effect a removal of surface waters and lowering of water plane and delivery of said water to the main disposal plant and gate systems, also

Exhibit No. 27—(Continued)

outlining the plant necessary to care for maximum rainfall conditions during the high water, and a system of levees to protect against overflow during spring freshets in the Columbia River. Attached to this report is a contour map, Plat 1, showing the physical characteristics of these lands included in District No. 2. The District has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1—this fill upon completion of District No. 2 will not act as a dike since District No. 1 will be reclaimed by its west, north, and south levees, connecting with system No. 2. It will, however, constitute an additional element of security to Districts Nos. 1 and 2. The north boundary of the district will be the bank of Oregon Slough and Columbia River. It will be noted by reference to Plat 1 that this ground is comparatively high approximating Elevation 25. It is proposed here to increase this elevation to 28 ft. for a crown width of 20 ft. continuing same as a road on line with the present road or street along this frontage. This material will be placed by a suction dredge and sloped 5 to 1, the river slope being faced with clay and planted to willows. This dike will extend east to an intersection with the east line of Leonard Gertz property.

The land will be protected on the south by a dike constructed along the north bank of Columbia Slough. It will be noted this ground is comparatively high, approximate elevation 15, and dike

Exhibit No. 27—(Continued)

will be formed by dredging material out of bottom of Columbia Slough and placing in embankment with clam shell dredge. This dike will have an eight-foot crown at the 28 ft. elevation, and approximating 3 to 1 slopes. Suitable berm will be left so that sloughing off of shoulder to 1 to 1 slope would still leave ample protection to the dike against under cutting. Its slough slope will be planted to willows and sowed to grass as bank protection. Experience has shown that this material, after placing, is not eroded by current in Columbia Slough during high water. This dike is shown in typical section by Plat 2 and will continue easterly along Columbia Slough to the tributary slough designed as McBride Slough as shown on Plat 1, to the east line of Leonard Gertz property and along this east line to the north dike along the Columbia River above referred to.

It is apparent that this will affect a complete closure of the land included in this district against high water. In addition to this it is proposed to connect up the interior drainage as shown on Plat 1. It will be noted that there exists three major depressions to be drained marked on Plat 1 as A, B and C. "A" has a bottom elevation of approximating 8, and is formed by the Union Avenue fill damming up the natural drainage to same. This is to be drained by a culvert placed through this fill, and thence by natural waterway to Mud Lake. Depression "B" will likewise be connected by pipe through Derby Street fill to drainage in District 1,

Exhibit No. 27—(Continued)

and depression "C" or Switzler Lake has bottom elevation of 4 and will be connected as shown through Union Ave., fill to depression "B." Both depressions "B" and "C" will have smaller independent gates direct to Columbia Slough to affect direct drainage of these areas at low water. Under this plan all the drainage at high water will go to the main pumping station in District 1, and there will be pumped out of the district by the combined plant operated jointly by the two districts, under the construction of District 2. The permanent station will be constructed on District 1, adjacent to the present temporary building and an additional 18-inch pump installed to care for District 2. The combined capacity of the two pumps will be under the 20 ft. head approximating 18,000 gals. per minute, which will be ample to care for rainfall and seepage during high water. During low water the drainage will be by gravity through the gates. The pumps will be electrically operated by 75 H.P. motors and take power from Power line of District 1. There will be included in Peninsula Drainage, District 2, 1519.3 Acres. While some filling will doubtless be advisable by the owners of depression "B" to bring above elevation 5, the majority of this land in District 2 will be readily available for cultivation when drained and protected against spring freshets and will raise all the grass crops, cabbage, kale, grain and prove valuable for dairying.

There will be no work to affect the west closure

Exhibit No. 27—(Continued)

and little to raise the north line to elevation 28, so that but two sides will involve work of much magnitude at such time as District 3 is formed to the east, ½ the cost of this end should be refunded to District 2. Your engineer finds that the embankment will require approximately 400,000 yards of material and that the cost per acre will be approximately $40.00 per acre. A study of the hydrographs of the Columbia River for a number of years and computation of pumping charges shows that pumping cost will approximate an average cost of 80 cents per acre per year.

Plat 1 shows inside drainage, gates and ditches later to be made by dredge at proper stage of the river.

Respectfully submitted,

/s/ PHILIP H. DATER.

[Endorsed]: Filed January 18, 1918.

[Endorsed]: Filed August 5, 1953, U.S.D.C.

EXHIBIT No. 28

Special Meeting of the Board of Directors of Peninsula Drainage District Number Two

Portland, Oregon,
September 18, 1942.

A special meeting of the Board of Supervisors or Peninsula Drainage District Number Two was

held in the offices of the May Hardware Company, 317 S.W. Front Avenue, Portland, Oregon, on Friday, September 18, 1942 at 8:00 p.m., All of the supervisors were present at the meeting as follows:

J. H. MacKenzie
T. G. Donaca
Tony Fazio

The president, J. H. MacKenzie, presided, and the secretary, H. L. Boyles, kept the minutes.

The minutes of the previous meeting were read and approved.

The secretary read a list of warrants Number 2450 to and including Number 2511 which were approved. The list is attached hereto.

The secretary read a letter from the Oregon State Highway Commission regarding the underpass on Denver Avenue. It was decided that the district instruct the secretary to write to the Oregon State Highway Commission and request plans and specifications for the proposed underpass and also express a desire of having the underpass connect with Schmeer Road in order to give through traffic from Denver Avenue to Vancouver Avenue.

The secretary read an option from the State Highway Commission to obtain 250 ft. along the Columbia Slough adjoining the Gault property in order that the Highway Commission could purchase Mr. Gault's property to make an underpass at Denver and Union Avenue bridge.

Mr. Fazio made the following motion which was seconded by Mr. MacKenzie:

"Be It Resolved that Peninsula Drainage District Number Two, owners of a parcel of land lying in the Southwest quarter of the Southwest quarter (SW¼ SW¼) of Section 34, Township 2 North, Range 1 East, and in the Northwest quarter of the Northwest quarter (NW¼ NW¼) of Section 3, Township 1 North, Range 1 East, W.M., Multnomah County, Oregon, conveyed by that certain deed to Peninsula Drainage District Number Two, recorded in Book 331, Page 573, of Multnomah County Record of Deeds, give the Oregon State Highway Commission a real estate option to buy 250 feet on the westerly end of said plot of land for and in consideration of the sum to One Thousand Two Hundred Fifty and no/100 Dollars ($1,250.00)."

The resolution was passed. The only dissenting vote was that of T. G. Donaca.

There was no further business to come before the meeting and it was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 29

Annual Meeting of Landowners of Peninsula Drainage District Number Two

Portland, Oregon,

October 26, 1942.

The annual meeting of the owners of land in Peninsula Drainage District Number Two was held at the schoolhouse of Columbia School District Number 33, Faloma, on the 26th day of October, 1942, at 8:00 p.m.

The following landowners were present in person or represented at the meeting:

	No. Acres
Northwest Properties, Inc., by Ivan F. Phipps, its proxy	44.408
Warren Packing Co., by Ivan F. Phipps, its proxy	245.453
Ivan F. Phipps, in person	1.014
Tony Fazio, in person	282.71
Riverton Land Co., by H. M. Seivert, its proxy	18.40
Robert H. Seivert, by H. M. Seivert	43.63
Columbia River Land Co., by J. H. MacKenzie, its proxy	118.44
J. H. MacKenzie, in person	6.25
Guy Lawrence, in person	7.28
Total acres	767.585

The president of the board of supervisors, J. H. MacKenzie, presided and the secretary, H. L. Boyles, kept the minutes of the meeting.

The minutes of the last annual meeting of the owners of land in the district were read and approved.

The secretary read the financial statement to the landowners concerning the operation and financial condition of the district for the period November 1, 1941, to June 30, 1942. The report was unanimously adopted. A copy of this report is attached.

The president announced the next order of business would be the election of a supervisor to succeed T. G. Donaca to serve for a term of three years. T. G. Donaca was the only candidate nominated and was unanimously elected.

Considerable discussion ensued concerning the underpass between Kaiserville and Peninsula Drainage District Number One and our district. It was decided that the Union Avenue right-of-way has no connection with our district and it is up to the United States Engineers and the State Highway Commission to adjudicate any differences concerning the effect on the drainage by the construction of this underpass.

Mr. Guy Lawrence gave quite a lengthy talk concerning the problems of School District Number 33. He has had several meetings with officials of the city and Government but no definite decision has been made concerning the great increase in

students in this district. The talk was most interesting to the landowners.

The secretary read a letter from Ralph Clyde concerning city bus service to meet the growing demand in School District Number 33 for bringing children to school in the wet and cold weather. The landowners were advised that the supervisors were doing everything in their power to get a bus service for the district.

The president directed the secretary to read a letter from Mr. R. W. Schmeer regarding the drainage and condition of his land. It was decided that this was up to the board of supervisors to adjust in whatever manner they saw fit.

There was no further business to come before the meeting and it was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 30

Special Meeting of the Board of Supervisors of Peninsula Drainage District Number Two

Portland, Oregon,
November 30, 1942.

A special meeting of the Board of Supervisors of Peninsula Drainage District Number Two was held in the offices of the May Hardware Company, 317 S.W. Front Avenue, Portland, Oregon, on

Monday, November 30, 1942, at 8:00 p.m. All of the supervisors were present at the meeting as follows:

J. H. MacKenzie
T. G. Donaca
Tony Fazio

Mr. Ivan F. Phipps, one of the district's attorneys, was also present at the meeting.

The president, J. H. MacKenzie, presided and the secretary, H. L. Boyles, kept the minutes.

The minutes of the previous meeting were read and approved.

Mr. Fazio complained of the heavy water on his farm land due to heavy rains and improper drainage. It was decided that Mr. Fazio would be appointed as a committee of one to make a report to the next meeting of the supervisors on the drainage ditch under Union Avenue and the approximate cost so that it could be provided for in the next budget.

Considerable discussion ensued concerning the underpass at Kaiserville on Denver Avenue. It was decided that our attorney Mr. Phipps write a letter to the Oregon State Highway Commission to see if this matter could not be rectified so that our drainage system would not be disrupted.

Bills were present from attorneys R. R. Bullivant, and Maguire, Shields, Morrison & Biggs in the sums of $70.00 and $540.00, respectively, and approved for payment.

Mr. Phipps brought up the subject of the compromise on Mr. Schmeer's undivided 3/10 interest in certain properties in the district against which we have back taxes and interest from the year 1931. After considerable discussion it was decided that the matter should be brought up at a later date because of lack of evidence on the part of the supervisors to enable them to make a decision.

It was suggested that the secretary be instructed to write to the State Highway Commission concerning the construction of a road between Denver Avenue and Vancouver Avenue known as the Schmeer Road as we now have the right-of-ways through all property.

There was no further business and the meeting was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 31

Special Meeting of the Board of Supervisors of Peninsula Drainage District Number Two

Portland, Oregon,
April 19, 1943.

A special meeting of the Board of Supervisors of Peninsula Drainage District Number Two was

held in the offices of the secretary, 426 Davis Building, Monday, April 19, 1943, at 8:00 p.m. All of the supervisors were present at the meeting as follows:

J. H. MacKenzie
T. G. Donaca
Tony Fazio

Mr. Ivan F. Phipps, one of the district's attorneys, was also present at the meeting.

The president, J. H. MacKenzie, presided, and the secretary, H. L. Boyles, kept the minutes.

The minutes of the previous meeting were read and approved.

Mr. Fazio made a motion which was seconded and unanimously passed. (Resolved that Mr. R. H. Sievert be given notice that the rent on the Buland Tract be ten dollars per acre per year, on a month to month basis.)

Mr. Phipps suggested that the secretary write a letter to Mr. Gault, advising him that there is a boat hanging on the dyke in Columbia slough, that would, in case of high water, dig in and injure the rip-rap.

It was suggested that the secretary also write the Oregon State Highway Commission and the U. S. Engineers, advising them that the underpass on Denver Avenue, at Vanport, may cause trouble in case of a flood by dividing Districts No. 1 and No. 2, and that Denver Avenue serves as a dyke

between the two Districts. The Board of Directors feel that a stop-log should be erected on this underpass.

There was considerable discussion concerning the Schmear property, which is now under foreclosure proceedings.

We were advised by Mr. Phipps that if the district would offer a compromise, Mr. Schmear would consider paying all back drainage taxes.

Mr. Fazio made the following motion, which was seconded and unanimously passed: (Be it resolved that for a period of ninety days from April 19, 1943, all interest and penalty on drainage taxes shall be abrogated to all taxpayers paying in full.)

It was suggested by Mr. MacKenzie that our attorney immediately take steps to close all cases we have now pending for tax foreclosure.

The resolution was passed, a copy of which is attached herewith, authorizing the First National Bank, Main Branch, Portland, Oregon, our paying agent for $60,000.00 refunding bonds.

There was no further business to come before the meeting and it was adjourned.

/s/ H. L. BOYLES,
Secretary.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 32

United States District Court
District of Oregon
Civil No. 5190
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN, Husband and Wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

DEPOSITION OF DONOVAN C. BYERS
Taken on Behalf of Defendant, Pursuant to Federal Rules of Civil Procedure

Be It Remembered That, pursuant to the Federal Rules of Civil Procedure and the oral stipulation hereinafter set out, the deposition of Donovan C. Byers was taken on behalf of the Defendant before Ira G. Holcomb, a Notary Public for Oregon, on the 15th day of September, 1952, beginning at 4:30 o'clock p.m., in the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances:

WILLIAM C. RALSTON,
Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney General, Appearing on Behalf of the United States of America.

Exhibit No. 32—(Continued)
(Deposition of Donovan C. Byers.)

Stipulation

Mr. Lowry: Mr. Ralston, may we have a stipulation that all objections save to the form of the questions are reserved until the time of trial?

Mr. Ralston: Yes, it is so stipulated.

Mr. Lowry: Again, as in the case of Mr. Phipps, I do not expect to ask Mr. Byers any detailed questions as to his damages, but the United States will probably want to conduct some discovery proceedings later along that line in case it turns out to be necessary.

Mr. Ralston: Satisfactory.

DONOVAN C. BYERS

was thereupon produced as a witness on behalf of Defendant, pursuant to the Federal Rules of Civil Procedure, and, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows: [2*]

Direct Examination

By Mr. Lowry:

Q. State your full name.

A. Donovan C. Byers.

Q. What is your address, Mr. Byers?

A. 1150 Northeast Faloma Road.

Q. Portland? A. Portland 11.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Are you an engineer?

A. I am an architect. During the Housing Authority days I had the title of engineer, through no qualifications.

Q. Have you had some training as an architect?

A. Yes.

Q. Where? A. University of Oregon.

Q. Any degree? A. No degree.

Q. Have you had some experience as an architect?

A. I was licensed as an architect in the State of Oregon in 1946 and I have practiced my profession since then, and from 19 I was employed in an architectural office.

Q. Are you one of the plaintiffs who has sued the United States on account of property damage in Peninsula Drainage District No. 2 on account of the May, 1948, flood? A. Yes. [3]

Q. Mr. Ralston is your attorney?

A. That is right.

Q. Did you, in May and June, 1948, own some property in Peninsula Drainage District No. 2?

A. I did.

Q. Where was it located?

A. Lot 5 and a portion of Lot 6 in South Shore Acres, a subdivision.

Q. Would you tell me where that is with reference to streets and roads in Peninsula Drainage District No. 2?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. It is near the intersection of Gertz Road and Faloma Road.

Q. That is east of Union Avenue?

A. That is right.

Q. What is the nature of this property?

A. Residential.

Q. When did you acquire it? A. 1938.

Q. Was it improved then?

A. Yes, it had a house on it.

Q. Do you recall, roughly, what you paid for the property? A. Exactly; $2,930.

Q. Did you at any subsequent time make any improvements on it? A. Yes.

Q. About when?

A. I am sorry. I haven't any idea what date it was. As a [4] matter of fact, it was a continuous thing. I spent money improving it over the years. Every year I put some money into it.

Q. Have you any idea how much money you put into it all told?

A. Oh, I think approximately $20,000.

Q. Most of which, I take it, was put in subsequent to 1942? A. The major portion.

Q. The improvements that you have made were in the nature of improving the house?

A. Yes.

Q. Did you have any other property in Peninsula Drainage District No. 2? A. No.

Q. Was your property in that Drainage District insured in May and June of 1948?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. Yes, insured, but not against the flood.

Q. What insurance company had the insurance?

A. I don't know who had it then. That was 1942?

Q. No, in 1948.

A. Let me put it this way: Ward Cook & Company were agents for whatever insurance company it was. I don't know.

Q. Ward Cook & Company is a Portland concern? A. Portland.

Q. You have not collected any claims against the insurance company on account of the 1948 flood damage? [5] A. No.

Q. I understand at one time you were employed by the Housing Authority of Portland?

A. That is right.

Q. When did that employment begin?

A. You are going to find during this whole discussion that I am very poor on dates.

Q. Just do the best you can, Mr. Byers.

A. I would say in 1942 sometime.

Q. In what capacity?

A. At that time I was assistant to the maintenance superintendent when I was hired by the Portland Housing Authority.

Q. Who was the maintenance superintendent?

A. George King.

Q. How long did you continue on that job?

A. Approximately a year.

Q. Then what happened?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. I was employed as maintenance engineer to take Mr. King's place when he left the Authority.

Q. Your responsibility covered what important projects of the Housing Authority?

A. Everything that the Portland Housing Authority managed.

Q. How long did you have that job?

A. Until August, 1945.

Q. Then what happened? [6]

A. I resigned.

Q. You have had no connection with the Portland Housing Authority since August of 1945?

A. No.

Q. Ever been employed by the United States?

A. Well, not directly.

Q. The reservation you have in mind is your employment with the Portland Housing Authority of Portland?

A. Yes. Are you excluding military service?

Q. Yes, I was. A. Yes.

Q. During the period you were maintenance engineer for the Housing Authority of Portland to whom did you report? A. K. E. Eckert.

Q. Do you recall when the underpass was built along Denver Avenue? A. Only slightly.

Q. Did you have anything at all to do with the construction of the underpass? A. No.

Q. Do you recall hearing any discussions about that underpass?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. Not at the time of the construction, no, other than neighborhood gossip.

Q. But you at least knew of its being built?

A. Yes. [7]

Q. Did you have anything to do with the construction of the ring levee around that underpass?

A. No.

Q. Were you around the Vanport area from time to time when that ring levee was being built?

A. I can't remember whether it was entirely completed or not when I started visiting the project regularly, but I believe that the levee was done at that time. I am not positive.

Q. Do you recall anything about the reconstruction work done on the ring levee in the fall of 1943?

A. The 1943 reconstruction?

Q. All I know is this, Mr. Byers: After the levee was first completed, then some additional work was done which consisted principally of putting some clay down the slope.

A. No, I don't particularly recall that.

Q. When do you recall first paying any particular attention to this ring levee?

A. In what I believe to be 1944, after the project was all occupied and it was a going thing. Then it was my responsibility to look at that levee along with the other levees.

Q. Do you recall any particular occasion on which you first paid some special attention to the ring levee?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. I am not positive whether I made any particular note of the condition of the levee prior to 1944 or not. I do recall that during one of the early years that I had to do with the [8] Vanport project we had a high water, 27 feet, I believe, at which time we were very much concerned about the condition of the dike. We were not worried particulary, but were looking to see that everything was as it should be. We even had to round up stop logs, such as Mr. Phipps has referred to, for one of the openings at the opposite corner of the Drainage District. That matter had fallen to Vanport's management to take care of. Whether I made any particular note of the condition of the levee at that time or not I don't know, but I do know that in what must have been 1944, I made an inspection of the top of the dike along with some of my employees, members of the Vanport staff, and found it was sloughing away back.

Q. Do you recall in what season of the year you made that inspection?

A. It might have been spring, summer or fall. I do recall that I was out there in good weather, not slushing around in the mud.

Q. Who was with you?

A. I am sorry, but I don't remember, other than that they were Vanport personnel.

Q. Do you recall what you did, Mr. Byers?

A. Discussed the condition of the dike.

Q. I mean, what inspection did you make?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. Well, at that time the persons who were with me and I discussed the condition of it amongst ourselves, that is all. [9]

Then I later called the U. S. Engineers.

Q. Let me find out a little more about what you discovered on your inspection. A. Okeh.

Q. Could you tell me in some detail what you found?

A. We found sections of the dike, outside edges of the dike—by "outside" I mean the side surface on both sides—had slipped, that the slopes were sloughing off.

Q. This was up at the crown?

A. Started at the crown, yes, and slid clear to the bottom.

Q. Do you recall how many such places you observed? A. No.

Q. Do you recall seeing any cracks?

A. There were a number of very large cracks in the top of the dike which extended down for a number of feet; you could see them for a number of feet, but how much further they went I couldn't say.

Q. How far down could you see?

A. Two and three feet, I should say.

Q. And about how wide?

A. I would say that some of them were as much as eight to ten inches wide at the top.

Mr. Ralston: How much?

The Witness: Eight or ten inches.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. (By Mr. Lowry): Do you recall how many such cracks there [10] were?

A. I don't recall anything like how many there were, except that they were more or less continuous along the entire length of the dike and they occurred —not just one in the top but several—there were several cracks.

Q. At the time of this inspection did you go down and look at the toe of the levee on either side? Do you remember?

A. I don't remember, but I probably did. I walked all over it.

Q. Do you think you have told me everything you saw?

A. No. We saw also that the top of the levee had settled, according to my memory, I would say two feet below the height where it joined onto the higher end.

Q. Where had the settlement taken place?

A. Where the greatest bulk of the levee was, it was cracked. It was towards the end where the levee was lesser in height.

Q. Had it settled in the center at all?

A. In the middle of it, yes.

Q. Over how long an area, do you remember?

A. Well, like I say, it was greater in the center and extended in a lesser degree to each end, the full length.

Q. And the net result was the center of the levee was lower? A. That is right.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Would you think it might have been as much as two feet lower? [11]

A. Well, that was ten years ago. That is my memory, yes.

Q. Is there anything else you remember, Mr. Byers? A. I don't remember anything else.

Q. Did you report this condition to anyone at the Housing Authority?

A. As I say, I had members of the staff of Vanport with me at the time, I am sure. I do not recall any specific report. I discussed my day's work with my superior almost every night.

Q. With Mr. Eckert?

A. Mr. Eckert. I made memorandum reports to him almost daily as to what my activities had been during the day.

Q. Do you recall any such memorandum report with respect to this inspection?

A. I do not recall it, no.

Q. You do not have it now? A. No.

Q. I think you said you called the United States Army Engineers? A. That is right.

Q. Do you remember to whom you talked?

A. I don't recall, but I talked to the office of the Engineers here in Portland. I called them for technical advice on a subject in which I felt they were experts.

I was hired by the Portland Housing Authority as an engineer, as a maintenance engineer, but this particular kind [12] of work was out of my field. I was looking for expert advice.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. What did you ask them to do?

A. I asked them to come on the site with me and look at it and give me their verbal opinion of what this condition was and what it was due to and perhaps what should be done about it.

Q. Did something like that happen?

A. Two members of the Corps met me on the dike—I don't know who they were. Believe me, I have tried to remember. They met me on the dike and inspected it with me.

Q. Was this shortly after your first inspection?

A. It was.

Q. It would have been a matter of days?

A. A matter of days.

Q. Do you recall seeing anything on the second trip other than what you have already told me about that you saw on your first trip?

A. I don't recall anything, no.

Q. Do you recall any conversation with these members of the Corps of Engineers?

A. Yes. I recall that they told me at that time that the dike was not even a dike in their estimate; that the slopes of it were so steep that they did not constitute a properly constructed dike; and that its composition was not properly that of a good [13] dike.

Q. Let's see. Did these men purport to know what that dike was composed of?

A. Yes, they did. They spoke with considerable knowledge of it.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Do you recall any discussion about the significance of the cracks?

A. No, no discussion with them concerning it that I recall.

Q. Have you told me everything you remember about your discussion with these representatives of the Corps of Engineers?

A. No. There is one other item: They explained to me that it was entirely out of their jurisdiction and that all they could do was advise me as to what they presently thought should be done.

Q. Did they make any explanation of why they took that position?

A. I don't remember whether they explained that or not. I might be mixed up—might be mixing it up with the fact that I think I know why. In other words, I have lived in the District and know something of the balance of responsibility between the Engineers and the District, and they might have told me then or not. I don't know.

Q. Do you recall anything else at all about the conversation with those men? A. No.

Q. What was the next development after the meeting with the [14] representatives of the Corps?

A. I took it upon myself, with my office and assistants available in the office, to have an estimate prepared of how much work would be involved in rebuilding that dike to a proper width at the bottom, with proper slopes.

Q. You said you prepared your own estimate?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. Yes.

Q. What did you assume to be proper slopes and a proper width?

A. To cut the levee down from its existing one and one-half to one slope to two and one-half to one slope.

Q. Did you come to this conclusion as to what constituted a proper slope on the basis of the information provided by the Corps of Engineers' representative? A. Yes.

Q. Did you have any other information about it? A. No.

Q. What you proposed, then, was a complete reconstruction of the levee?

A. No, not to tear it out and remove it and rebuild it, but to take the earth that was there and spread it out and recap it and then blanket the entire dike, both sides, after that had been done.

Q. I understand you prepared an estimate of how much that might have cost? [15]

A. That is right.

Q. Do you remember what its cost was? Was this estimate prepared in writing?

A. It was. It is in what were my files at that time. This is a wild guess, but I believe that we got an estimate of the cost of the work from Joplin & Eldon, who are earth-moving contractors here, or were at the time.

Q. I want to understand just exactly what you

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

did. You say you prepared an estimate. Did you then submit it to Mr. Eckert or to someone?

A. Yes, I submitted it to Mr. Eckert.

Q. Then did he or you get in touch with Joplin & Eldon?

A. No. I had already gotten in touch with Joplin & Eldon and gotten such an estimate of what it would cost to do that work. I made a report of what I had found to Mr. Eckert.

Q. Was this made orally or in writing?

A. Probably in writing, an interoffice memorandum.

Q. Do you personally have a copy of that report? A. No, I have not.

Q. I understand you got this estimate of the cost of the work to be done. Then what happened next, as far as you were concerned?

A. I sincerely believe that I wrote a letter for Mr. Eckert's signature, to the Regional Office, Attention of Mr. Crutsinger, which I do not find in that file, requesting funds to do that [16] work.

Q. You do recall preparing such a letter?

A. That is right.

Q. Do you know whether the letter was ever sent?

A. I have reason to believe it was because shortly after that letter was sent Mr. Peirson visited Portland. I don't recall whether he contacted me or my superior, but I had very definite instructions after that that I was exceeding my authority in con-

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

tacting the Engineers—I should not have brought them into the picture at all—and that that levee was okeh and a proper levee as constructed; all it needed was a little repair job. However, I never got a letter in writing back.

Q. You say Mr. Peirson visited Portland?

A. Yes, sir.

Q. Do you recall that he talked to you about the ring levee?

A. No, sir; I don't recall whether I personally was contacted by Mr. Peirson and told these things or whether he told my superior all this and it was relayed to me.

Q. You say you received some instructions about how you had exceeded your authority. From whom did you receive those instructions?

A. That is what I say I don't remember, whether he gave them to me directly or whether he came to my superiors and told them and they in turn told me that I had gone beyond my field.

Q. You are telling me you remember very distinctly somebody [17] told you that you got out of bounds, and yet you don't remember who told you?

A. That is right. I don't remember whether it was my superiors or Mr. Peirson who was there at the time.

Q. You would not have any opinion about that at all, as to who that was?

A. I am sorry, I don't. This was fourteen years ago, I guess.

Q. I understand that.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. Longer than that.

Q. After this conversation about your authority, did you have anything further to do with the ring levee around the Denver Avenue Underpass?

A. Yes. I was told to prepare a program of repairs.

Q. Did you prepare such a program?

A. Yes.

Q. What did that program consist of?

A. Reworking the face of the levee where it had sloughed off the worst, the outside face, the face next to No. 2, cutting it down, as described in one of these letters, cutting down the surface and repacking it in layers and then filling in the cracks on the top and building a crown over the top after bringing the top of it level.

Q. Who gave you instructions to do that?

A. Mr. Eckert, my superior.

Q. Did you prepare such a program? [18]

A. I don't know that I prepared it specifically as a program. We, in turn, had estimates prepared on such a program and wrote letters to the Regional Office requesting authority to do that work.

Q. What happened after that?

A. We were authorized to do it.

Q. Was that work actually done?

A. I believe it was.

Q. You said it was your business to inspect this levee? A. That is right.

Q. Wouldn't your inspection trips show you whether or not that work was done?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. That is right. The nature of your question threw me off. I would say positively that it was done.

Q. I want to be sure that we have in mind here just what was done. A. Yes.

Q. The outside slope was reworked and the cracks were filled in?

A. The outside slope was reworked very shabbily.

Q. What do you mean by "very shabbily"?

A. To a width of perhaps four feet.

Q. You went four feet into the slope?

A. We went to the bottom where the worst slides had occurred and widened it to a width of approximately three or four feet, [19] and then worked the face up with new material, only in the areas that had sloughed off.

Q. Does that really mean you extended the levee three or four feet? Is that the effect of what you did?

A. That would be the effect in those areas where it had sloughed, yes, because we started from that sloughing at the bottom and added material to that, to bring that up to an even slope to the top.

Q. Do you know where that material you added came from? Of course, this work was done under your personal supervision?

A. Not under my direct supervision, no.

Q. Do you have any idea who supervised it directly?

A. No, only that it would have been done directly under the supervision of Oral K. Tichenor, who was

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

maintenance superintendent on the project. He may have delegated it to someone.

Q. What is that name?

A. Tichenor, T-i-c-h-e-n-o-r.

Q. Is Mr. Tichenor still in this area?

A. Yes.

Q. Do you know what he does?

A. Yes. He is Manager of the Preservative Paint Company on the East Side.

Q. To get back to this work, Mr. Byers, I understand that in areas where you sloughed you added some material and reworked the face? [20]

A. That is right.

Q. What was done about the cracks?

A. We tamped them full of dirt; put dirt into them and tamped it down in and then added material across the entire top as a capping. Our purpose was to keep the water from making a water course of these cracks and thus taking dirt out of the bottom; we tried to get an impervious capping there.

Q. Do you know where that material came from?

A. No, I don't know.

Q. This work was done by the employees of the Housing Authority of Portland?

A. I believe so. I don't believe we put it out on contract.

Q. In addition to reworking the surface and fixing the cracks, was anything done to the ring levee? A. Nothing.

Q. Do you recall seeing the ring levee after that work was done?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. I do not specifically recall it.

Q. Do you recall ever making any report to the United States Army Engineers on the work that was done in repairing the ring levee?

A. I am sure I did not.

Q. You are sure you did not?

A. That is right.

Q. Do you recall making any report to any representatives of [21] the United States?

A. Not other than the representatives of the Federal Public Housing Authority. I made my verbal reports to them.

Q. To whom?

A. To Harold Munday. I don't know whether I would have reported to Peirson or not; probably not—but I know I would have reported to Munday.

Q. What was Mr. Munday's job at that time?

A. Mr. Munday was the assistant to the Director of the Federal Public Housing Authority in Region 9 for maintenance.

Q. Did he come to Portland from time to time?

A. Yes.

Q. Do you specifically recall talking to Mr. Munday about this ring levee? A. Yes.

Q. So, what you are saying is that, just as a routine matter, you would report it?

A. I reported to him. He made inspection trips on the project very frequently, and we always went over the work that had been done.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. But you do not recall any particular conversation or report? A. Not specifically, no.

Q. Do you recall being on the ring levee at any time after you left the Housing Authority of Portland prior to when it [22] failed?

A. No, I do not.

Q. What is your opinion of the condition of the ring levee after the repair work had been done on it?

A. My opinion?

Q. Your opinion.

A. That it was hopelessly inadequate.

Q. Did you tell this to anybody?

A. I told it to Mr. Peirson.

Q. Do you recall when that conversation took place?

A. Sometime subsequent to my being told that it could only be repaired and not rebuilt.

Q. While you were still with the Housing Authority?

A. While I was still with the Housing Authority.

Q. In that conversation did you tell Mr. Peirson about the repairs that had been made?

A. May I ask a question?

Q. Surely.

A. Are you asking if I remember a specific conversation or my recollection simply of what happened?

Q. I would like you to remember, if you can, specific events.

A. I do not remember any specific conversation

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

with Mr. Peirson. However, I saw him frequently, many, many times, and we discussed the problems in connection with the project almost every time I met him. [23]

Q. In these conversations you had with Mr. Peirson and Mr. Munday, of course you were, in a sense, talking with employees of the Housing Authority of Portland? A. I was.

Q. And, of course, the concern of the Housing Authority of Portland was for Vanport?

A. Yes, sir; and that was the concern that I was expressing when I was concerned about that levee.

Q. You felt it was inadequate to protect Vanport? A. That is right.

Q. Had you given any attention to whether or not it was adequate to protect Peninsula Drainage District No. 2? A. I gave that attention, too.

Q. In the attention that you gave to this levee, Mr. Byers, did you understand the principal flood danger was from water that might first come into Peninsula Drainage District No. 2 or Peninsula Drainage District No. 1?

A. I hope I am a logical man, and it has always been my impression, my understanding, that that was a levee to protect one from the other in case either of the others met with disaster, that it was for the protection of one or the other.

Q. Do you recall any discussion at all on that point with Mr. Peirson or Mr. Munday?

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

A. Oh, no; I do not.

Q. The reason I asked you about that was that Mr. Phipps said [24] today—perhaps you heard him—that the principal concern at the time of the 1948 flood was water coming from the eastward and traveling westward—that is, coming first from Peninsula Drainage District No. 2. I wondered if you had any similar impression?

A. No, I had no such impression, I am sure.

Q. After these conversations with Mr. Peirson and Mr. Munday, and while you were with the Housing Authority of Portland, did you do anything else at all in connection with the Denver Avenue underpass or the ring levee?

A. No, sir; I don't recall that I did. Wait a minute. I am not sure whether it was my department or another department that ran a water line over that levee during the time I was connected with the Housing Authority, and I do recall that it was run over the levee, not through it.

Q. Do you recall anything else? A. No.

Mr. Ralston: You are referring now to the Housing Authority of Portland?

The Witness: The Housing Authority of Portland ran a water line from Vanport to East Vanport, over that levee.

Q. (By Mr. Lowry): You said you felt that the ring levee was wholly inadequate. What was the basis for that conclusion?

A. That it was constructed largely with sand;

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

that it was so steep and so narrow, which was not in conformance with the [25] advice of experts, the U. S. Engineers, who were the best authority I could find on levee construction.

Q. Have you told me everything you can remember about any discussions you might have had with either Mr. Peirson or Mr. Munday about the adequacy of the ring levee? Do you remember any details of those conversations?

A. May I give you an impression I got?

Q. Surely.

A. Mr. Peirson, it was my impression, took a personal affront to my questioning the levee which he had caused to be constructed.

Q. That is an impression?

A. That is the impression that I had and that I have carried with me for years. Incidentally, I have a high regard for Mr. Peirson.

Q. Do you recall any details of the conversation with Mr. Munday? A. No.

Q. I think you said you did not report the conclusions you reached about the adequacy, or inadequacy, of the ring levee to the Army Engineers?

A. That is right. I did not.

Q. Did you report it to any representative of the United States other than Mr. Peirson and Mr. Munday? A. I did not, no. [26]

Q. Did you take this subject up at all with the supervisors of Peninsula Drainage District No. 2?

A. No.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Do you recall any discussion with anyone at all other than the people you have told me about?

A. No, I don't recall discussing it with anyone else. I might have mentioned it to neighbors, but I don't recall any discussion.

Q. Did you try to do anything about it?

A. I had done all I could do. That is the way I felt about it. When I had been told to stop that by people who paid me every month, I quit.

Q. At the time you reached your conclusion about the adequacy, or lack of it, of the ring levee, was there any reason to expect that any primary levees in either Drainage District would fail?

A. No.

Q. So your conclusion was based on an assumption that they might fail?

A. That is right, because that is the reason that levee was there.

Q. Your own opinion was that it ought to be built so as to have strength similar to the strength of the primary levees?

A. That was my opinion.

Q. And it was because, in your opinion, it was not equally [27] as strong as the primary levees you felt it was inadequate? A. That is right.

Q. Do you recall hearing or participating in any discussion about the ring levee after you left the Housing Authority of Portland and prior to the time of the flood? A. I do not recall it.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Do you recall that you made any personal inspection of the condition of the ring levee after you left the Housing Authority of Portland and prior to the flood in 1948?

A. No, sir. May I interject something?

Q. You don't recall it?

A. No, I don't recall it.

Q. You are a member of Peninsula Drainage District No. 2, at least in the sense that you pay assessments? A. That is right.

Q. Have you ever been an officer of that District? A. No.

Q. Have you ever attended any meetings of the landowners of the District?

A. Annual meetings, yes. I attended a number of them.

Q. Do you recall any discussion at those meetings prior to the flood concerning the Denver Avenue underpass or the ring levee?

A. No, I don't. I don't recall any such discussions, not that such discussions did not take place but because I was [28] there for another purpose.

Q. Do you recall that you ever suggested to the other landowners in the District at those meetings that you thought the ring levee was inadequate?

A. I don't recall that I ever suggested it as any official business of the District. I am sure I must have discussed it with my neighbors.

Q. But you do not recall any such discussion at any one of these annual meetings? A. No.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Were you in this area, Mr. Byers, during May and June, 1948?

A. I was during those months. I was not there during the day of the flood. I was in Oakland.

Q. Oakland, California? A. Yes.

Q. When did you leave Portland in May of 1948? How long prior to the flood?

A. Let me see; two or three days; I don't recall exactly.

Q. Did you participate at all in the flood fight prior to the time you left?

A. No, at the time I left there was no flood fight going on.

Q. When did you get back?

A. The day after my house went under water, the Tuesday following Monday, which was Memorial Day. [29]

Mr. Ralston: No, Sunday was Memorial Day.

The Witness (Continuing): I came back Tuesday, if I remember my dates correctly. Anyway, it was the day following.

Q. (By Mr. Lowry): Was your wife living here at the time?

A. My wife and children were with me on my trip to Oakland. Her family was the reason for the trip.

Q. So there was no one living at your house during the flood?

A. My parents lived in a small house on the same property with me, and they were there.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Q. Did they leave prior to when the water came in Peninsula Drainage District No. 2?

A. They did. My father and my business partner took a walk up to the levee and took a look at the water behind it and decided it was time for them to move, and my partner, his two boys, my father and cousin moved my father and myself lock, stock and barrel the day before. We were told about it.

Q. They took everything out which was movable?

A. Nearly everything. There were some things left there.

Q. Mr. Byers, do you have in your possession any writings at all relating to the Denver Avenue underpass or the ring levee?

A. I can certainly say I do not, and I have certainly searched. As a matter of fact, I went back to my attic in the hope of finding that particular letter. I had copies of some letters that I wrote, as a member of the Portland Housing Authority staff, and I thought I might have that one—thought that I [30] might find it, and did not. I have that file and it is not in there.

Q. Mr. Byers, let me show you what appears to be a copy of a letter from E. Stanton Foster to C. H. Wick, dated June 6, 1944. Have you ever seen that letter before today?

A. I have not seen it before today.

Q. Who was Mr. Wick?

A. Mr. Wick was the Director of the Portland

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Housing Authority for development. He was in charge of the Development Division as my superior was in charge of the Management Division.

Q. I also have here what seems to be an inter-office memorandum from Wick to Freeman, dated July 8, 1944. Have you ever seen that before today?

A. No.

Q. I show you what appears to be a copy of a letter from the Housing Authority of Portland by Mr. Eckert to Mr. Crutsinger, dated September 5, 1944, carrying in the lower left-hand corner the initials "D.C.B.:J.L." Is it your recollection you prepared that letter? A. I believe I did.

Q. Then I show you what seems to be a copy of a letter from Harold R. Munday to the Housing Authority of Portland, dated September 15, 1944. Did you ever see that letter before today?

A. I think so. I believe there is even a sequel to it, authorizing an expenditure of funds. That authorizes the work [31] but not the funds.

Q. It is your recollection that the expenditure of funds was subsequently authorized?

A. Yes.

Q. And it was pursuant to that authorization that the repair work which you have already described took place? A. Yes.

Q. Do you know anything about Mr. Wick's background Is he a licensed engineer?

A. He is a licensed engineer and a college grad-

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

uate. That is, he has a degree in engineering. I beg your pardon. He hasn't, either.

Q. Mr. Byers, you heard me ask Mr. Phipps if he knew the names of any people who might know something about the condition of the ring levee after it was built and prior to the failure. Are there any such persons whose names occur to you in addition to those Mr. Phipps named?

A. Yes. It is my understanding that you have the testimony of Clinton McGill who was, during the period of the construction of Vanport, assistant to Mr. Peirson. He later became a member of my staff and is the person who helped me prepare the estimates.

Q. Anyone else?

A. I can say No, because I have checked the names of those who I thought might know, and they have denied any knowledge. [32] Then there was Mr. Griffin, who was Manager of the Vanport project at one time, and Mr. J. L. Franzen. You probably have him in your list of names.

Q. No.

A. He was Manager of the Vanport project from the time it started, in Management, up until Griffin took over as Manager. I do not know just when that transfer took place, whether Mr. Franzen or Mr. Griffin was the Manager of the project at the time this work took place.

Q. Is Mr. Franzen still in this area?

A. Mr. Franzen is City Manager at Salem. He

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

is a mining engineer. The chances are that he was there at the time.

Q. Does the name of anyone else occur to you?

A. It is possible that a man named Vic Feurstein—I can't spell that one for you; it is a German name; it is not spelled like it sounds. He was an employee of the City of Vanport, who personally directed the repairs to that dike.

Mr. Lowry: I guess that is all.

Mr. Ralston: No questions.

And Further Deponent Saith Not.

/s/ DONOVAN C. BYERS. [33]

Notary's Certificate

State of Oregon,
County of Multnomah—ss.

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 15th day of September, 1952, before me as such Notary, at the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time mentioned in the caption set out on Page 1 of the foregoing transcript Donovan C. Byers, a witness produced on behalf of the Defendant.

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

Mr. William C. Ralston, of Attorneys for Plaintiffs, appearing in their behalf, and Mr. Walker Lowry, Special Assistant to the Attorney General, appearing on behalf of the United States of America; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined, in answer to all interrogatories propounded by the Special Assistant to the Attorney [34] General, testified as in the foregoing annexed deposition, Pages numbered 1 to 33, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties,

Exhibit No. 32—(Continued)

(Deposition of Donovan C. Byers.)

or a relative or employee of such attorney or counsel, or fianancially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 30th day of September, 1952.

[Seal] /s/ IRA G. HOLCOMB,
Notary Public for Oregon.

My commission expires Aug. 4, 1956.

[Endorsed]: Filed August 5, 1953. [35]

EXHIBIT No. 34

DEPOSITION OF FRANCIS JOHN KERNAN

Taken on Behalf of Defendant Pursuant to Federal Rules of Civil Procedure

Be It Remembered That, pursuant to the Federal Rules of Civil Procedure and the oral stipulation hereinafter set out, the deposition of Francis John Kernan was taken on behalf of the Defendant before Ira G. Holcomb, a Notary Public for Oregon, on the 18th day of September, 1952, beginning at 1:30 o'clock p.m., in the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Exhibit No. 34—(Continued)
(Deposition of Francis John Kernan.)

Appearances:

WILLIAM C. RALSTON,
Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney General,
Appearing on Behalf of the United States of America.

Stipulation

Mr. Lowry: Mr. Ralston, shall we stipulate that all objections save to the form of the questions are reserved until the time of trial?

Mr. Ralston: So stipulated.

FRANCIS JOHN KERNAN

produced as a witness on behalf of Defendant, pursuant to the Federal Rules of Civil Procedure, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Will you state your full name, Mr. Kernan?
A. Francis John Kernan.
Q. Where do you live?
A. I live in North Portland.
Q. What is your address there? [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. My address is Box 56, North Portland.

Q. Do you have your residence or your home somewhere around North Portland?

A. Yes, I live right there by that grocery store, in an apartment house. I have 14 apartments there on that corner.

Q. That is the corner of what?

A. It is Denver Avenue and Union Avenue and North Portland Road, right at the foot of Denver Avenue.

Q. You refer to the point at the junction of Denver Avenue and Union Avenue and North Portland Road, is that it? A. Yes.

Q. What business are you in, Mr. Kernan?

A. Well, I am in the contracting business, the grocery business, the filling station business and the apartment business. I also have a boat mooring down there, too. General contracting, however, is my business.

Q. Are you one of the persons who has filed a claim against the United States on account of the 1948 flood damage in Peninsula Drainage District No. 2? A. Yes, sir.

Q. Who is your attorney in that case, Mr. Kernan?

A. Sheppard & Phillips, and Mr. Ralston.

Q. How long have you lived in the area of Peninsula Drainage District No. 2?

A. Well, I bought 2,000 acres of land from Swift & Company in [3] 1932.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. Did you go out there to live about that time?

A. I built a barn and put my office out there; moved out of an office building here in Portland and put my buildings out there in 1932.

Q. You have been there ever since?

A. Yes.

Q. Will you tell me what property you owned in May and June of 1948 in connection with Drainage District No. 2?

A. Yes; about 40 acres on Marine Drive, we call it.

Q. In between Faloma Road and Marine Drive?

A. Yes, 40 acres in there. I don't know just how I would get the thing lined up for you, but is that all right?

Q. Yes, that is all right. What else?

A. About 20 acres at Denver Avenue and Union Avenue, in District No. 1.

Q. Where are these apartments you mentioned?

A. They are in District No. 1 at the foot of Denver Avenue. Another 40 acres is where the farm is; that is over on Marine Drive on Gertz Road and Faloma Road—it sits right in there, right in front of the schoolhouse.

(Discussion off the record.)

Q. The only property you had in District No. 2 was the 40 acres along by the Faloma schoolhouse?

A. That is right. [4]

Q. When did you acquire that property?

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. 1932.

Q. Do you recall, roughly, what you paid for it?

A. I paid $90 an acre, I am pretty sure.

Q. Have you made some improvements on the property, Mr. Kernan?

A. Oh, yes. I cleared it all off. There was quite heavy timber on it and I cleared it all off and leveled it around there and built all the fences down through there. Of course, I had more property in those days.

I built a barn 120 by 80 feet wide or 120 by 40 feet and then I had two sheds built on the side, and I had another barn that I built, 40 by 60.

Q. When did you put these barns on the property?

A. In 1932 I started them. It took me a year to put the buildings up.

Q. Have you improved the property to any substantial extent since 1942 and prior to 1948?

A. Yes. I built my little half-mile race track in there which cost me—oh, it probably cost me $4,000.

(Discussion off the record.)

Q. I understand that you built the race track along about 1948?

A. It must have been built a couple of years before the flood.

Q. About 1946, then? A. Yes, I think so.

Q. About what value do you think you put into

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

that property [5] in Peninsula Drainage District No. 2 between 1932 and 1942, say, Mr. Kernan?

A. You mean clearing the land and all?

Q. Yes.

A. I spent $60,000 down there in clearing it off, clearing the land and doing all of this improvement, and then those buildings cost me about—the barn itself must have cost me about twenty-five or thirty thousand dollars. Then I have three houses on the place.

Q. They were all put in prior to 1942?

A. Yes. Those houses rent for $45 a month.

Q. So I guess it is fair to say that most of the improving you did was done prior to 1942?

A. Yes.

Q. Did you have insurance on any of this property that was damaged by the 1948 flood?

A. No, I didn't. I took that insurance off. I had all of that insured heavily, and I believe it was General Insurance, and we ordered a new blanket policy at that time on everything, when I was in the contracting business—under the other blanket policy we had everything covered, floods and everything, and when the new one went through Brice Mortgage, it did not have that provision.

Q. You have not collected any insurance money on account of the flood damage at all, then? [6]

A. No, and no money from the Red Cross or no money from anybody.

Q. Have you ever been an officer of Peninsula

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Drainage District No. 1 or Peninsula Drainage District No. 2? A. No, I have not.

Q. Of course, you have been a member of these Districts, these Drainage Districts, by reason of the fact that you owned land in the area?

A. That is right. Everybody that owns land is supposed to be a member of the District.

Q. Have you attended any meetings of the landowners?

A. Oh, yes. I go up there once in a while. They have a meeting once a year and sometimes they get into a battle out there and they call another meeting.

Q. You have attended the annual meetings pretty regularly?

A. Yes. They notify us with a card, so we generally go.

Q. That is in both Drainage District No. 1 and Drainage District No. 2? A. Yes.

Q. Of course, you have paid assessments on your property in both Drainage Districts from year to year?

A. Yes. We have a little better system in Drainage District No. 1. Swift & Company and the Western Waxed Paper and all these big companies are in there, and they don't squabble as much as the little fellows. [7]

Q. Were you out in this area when the underpass was built under Denver Avenue to provide access to Vanport?

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. I was right along in there all the time, yes.

Q. You were there when the ring levee was being constructed around the underpass? A. Yes.

Q. Mr. Kernan, did you make any protest to anyone about building the underpass itself?

A. Well, I did say to MacKenzie, who was on the Drainage District, and I think Tom Donaca was on there, that I thought it was not very much of a protection that we were going to get by that dike they were building. I understood Fred Christensen came in there with his dump trucks and dumped dirt. It was a small dike, just room enough for him to get on top.

Of course, I am not very much of a fellow to go around beefing or hollering my head off, but I know this job that was done in there certainly was a weak sister to take care of anything.

Q. And you said something about it to Mr. MacKenzie and to Mr. Donaca?

A. I believe I told Mr. MacKenzie. I am pretty sure I told Tom Donaca, too. I am pretty sure I told Tom Donaca. I asked them, "Who gave the Government," or "Who gave them permission to cut a hole in Denver Avenue"? and what kind of a dike it was they were building down there. [8]

Q. Do you remember talking to anyone else about it? A. No, I don't.

Q. You did not, however, talk to anyone in the United States Army Engineers, for example, about it? A. No.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. Or anyone with the Highway Commission?

A. No.

Q. What do you remember now, Mr. Kernan, about how that ring levee was built? Do you remember seeing it when they were first starting to build it?

A. I noticed these trucks go out there and dump sand in there. I am pretty sure that Fred Christensen hauled some dirt in there from basements, kind of a top soil or something like that, but I never paid too much attention to that, either, any more than I noticed it was about a 9-foot dike on top and had a straight up-and-down slope, about a one and one-half to one slope. It was just a little narrow dike, if you would call it a dike, because I have done quite a lot of diking myself, and I thought it was a very poor job to reinforce the property there, but I did not make any kicks to anybody. I just noticed it and didn't see any use of battling with these fellows.

Q. What I was wondering is whether or not you remembered anything about the technique by which the thing was built? For example, when trucks dumped sand in there, what would they do? Drive out on the levee and circle around it and dump the [9] sand?

A. No, sir; I understand they backed out and dumped it. I think they had some 'dozers. I didn't pay too much attention to that. I know that they just drove out and dumped it. It was not put in like you would ordinarily do it, just building it up. I

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

am pretty sure it was dumped out there by trucks, because I have seen the trucks dumping there.

Q. How was Mr. Christensen putting on this top soil, as you call it?

A. He just dumped it on top of the sand, because I know somebody else had hauled some sand in there and dumped it, and I am pretty sure Fred Christensen's trucks hauled some top soil in there and dumped it on top of this sand, so as to kind of make an apron over the fill.

Q. Did you ever go out onto the ring levee after it was built? A. No, I never did.

Q. You did not make any kind of an inspection of it at any time, any inspection of any kind?

A. No.

Q. So you don't know whether some cracks developed in it or not, do you? A. No, sir.

Q. Where were you at the time of the flood fight in 1948, Mr. Kernan?

A. I was working out on Faloma Road. You mean as the flood [10] was going into there? In fact, I was out there. I was a kind of a big shot out there; I had about 2,500 or 3,000 men out there. I was working under the Government Engineers' instructions, supervising these fellows around there, and had a bunch of trucks hauling in materials, filling up sacks, plugging up holes all around through there, and so on, and building it up so if the water came up it would not go over the top.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. This was on the river front levee of Peninsula Drainage District No. 2?

A. That is right.

Q. After the failure of Vanport were you down on Denver Avenue at any time before it failed?

A. You mean as the flood came in?

Q. Yes.

A. It was on a Sunday afternoon and I had been working—we had a number of head of horses and I just rounded them up and got them out of there. I had a few horses of my own, so in the afternoon I gathered up all my family and we took a horse apiece and we took them off the place and took them up around to 33rd Street and left them up there, and then I came back down to the corner by the grocery store and when I got down there Vanport had been hit and the flood was on. I just didn't see the flood that came in from the other side.

Q. As I remember, the water came into Vanport about 4:30 Sunday afternoon? [11] A. Yes.

Q. Then I think this ring levee at Denver Avenue failed the following night?

A. That is right.

Q. In between those two times were you out on Denver Avenue at all?

A. No. I left there about 3:00 o'clock and I didn't get back from where my business was until, I would say, 6:00 or 7:00 o'clock. I came there just about the time that another hole had washed out

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

over there and the telephone line went down. I would say I got there about 7:00 o'clock.

Q. You did not see the ring levee before it broke and after the water came into Vanport?

A. No.

Q. And you did not have anything to do with the flood fight that was conducted along Denver Avenue? A. No.

Q. Did you get news of some sort of an order for evacuation of Peninsula Drainage District No. 2 while you were out there?

A. Of course, when I came back, yes, after we had taken our horses out. I think that started in the afternoon some time.

Q. How much of your property did you move out of there before the water got into Peninsula Drainage District No. 2?

A. Well, we got some of the furniture out of the houses and put it up in the loft of the barn. I wasn't there, but [12] some of the sheriffs and someone else was moving the stuff out of the houses, what they could get out.

Q. Did you save some of it?

A. Yes; very little. At my house up on top of the hill I think they piled beds and stuff up on top of each other. We didn't lose it all. I don't know just how much.

Q. Did you try to take anything out of the Drainage District other than the horses; that is, move it out completely?

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

A. No. I think we put some stuff up in the lofts of these barns.

Q. Did you save the stuff that you had put into the lofts? A. Yes.

Q. Or did the barn get washed out, too?

A. One barn got washed out a little bit, but it didn't—the water came up to the floor of the barn and then there was a little platform up on top, so they put the stuff up there. We saved some of it.

Q. I understand you never had any discussions at all with any representatives of the Corps of Engineers about either the underpass or the ring levee before it broke? A. No.

Q. Did you have any discussions with anyone from the Housing Authority of Portland?

A. No.

Q. Or from the Federal Public Housing [13] Authority? A. No.

Q. Do you have anything in writing about the ring levee or the underpass or about the flood? Did you ever write any letters or see any letters relating to that or anything like that? Or did you ever make any reports to anybody?

A. I don't know whether I wrote out something and gave it to these fellows or not. I don't believe I did.

Mr. Ralston: He does not mean that.

Q. (By Mr. Lowry): In any event, nothing except what you might have given to your lawyer?

A. Nothing, no.

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Q. You don't have any photographs of the ring levee?

A. Yes, I have a photograph of the ring levee, afterwards.

(Discussion off the record.)

Q. Let me ask you some questions about these photographs, Mr. Kernan. After the ring levee broke in 1948, did you go out and make an inspection of it? A. Yes, I took those pictures.

Q. Of course, most of it was washed away, wasn't it? A. That is right.

Q. You took a look at what was left?

A. Took pictures of what was left, yes.

Q. I notice from these pictures you have handed me that there was a pretty heavy stand of grass and brush along on top and on the side? [14]

A. Yes.

Q. In the part that was left did you see any cracks up in the top of it or anything like that?

A. No, I didn't notice that. It had so much grass on it you couldn't hardly see down in there anyway.

Q. Did you notice anything that would give you any idea about why it broke?

A. Well, I will tell you. Some of the boys, the Government Engineers, said that right down at the foot of the dike, where she washed out, where the trees were, they had had some test holes down in there and they got sand, found sand, and when the water started to go in it went into that sand and

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

oozed right on through; it should have been built out of different soil.

On that marine dike they have got over there today, it is all built out of clay. It has got a good surface and is made to stand up under the Government Engineers' tests.

In this other one, the sand that is down underneath there, it just ran like water. I know down on the bottom of it there was sand.

Q. Did you see anything else?

A. Well, there were roots of trees in there, but you couldn't tell whether——

Q. Did you, at any meeting of either Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2, which you attended, [15] ever hear any discussion about the Denver Avenue Underpass or the ring levee?

A. Yes, but not in the meetings; outside, after the meetings, some fellow was discussing this underpass and the flood. I attended meetings like we always do when the water was coming up in the river. The Drainage District, No. 1, called a meeting in Mr. Williams' office in the Swift yards and discussed how they were going to fix up the dike, and so forth. We talked about how things were to be taken care of and how much money the Housing Authority had and how much money we had to pay these expenses.

Q. Did you attend a meeting of people from

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

Drainage District No. 2 that was held at the Red Steer Cafe a few days before the flood?

A. I didn't come to that meeting. The one I attended was just before that. I think, if I remember right, it was when Harry Freeman and four or five of the Housing Authority boys were up there; they had a meeting; they called a meeting at the Red Steer.

Mr. Lowry: That is all I can think of.

Mr. Ralston: No questions.

And Further Deponent Saith Not.

/s/ FRANCIS JOHN KERNAN. [16]

State of Oregon,
County of Multnomah—ss.

Notary's Certificate

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 18th day of September, 1952, before me, as such Notary, at the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time mentioned in the caption set out on Page 1 of the foregoing transcript Francis John Kernan, Lowry, Special Assistant to the Attorney General, a witness produced on behalf of Defendant.

Mr. William C. Ralston, of Attorneys for Plaintiffs, appearing in their behalf, and Mr. Walker

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

appearing on behalf of the United States of America; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined, in answer to all interrogatories propounded by the Special Assistant to the Attorney [17] General, testified as in the foregoing annexed deposition, Pages numbered 1 to 16, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my

Exhibit No. 34—(Continued)

(Deposition of Francis John Kernan.)

hand and notarial seal this 30th day of September, 1952.

[Seal] /s/ IRA G. HOLCOMB,
Notary Public for Oregon.

My Commission Expires: Aug. 4, 1956.

[Endorsed]: Filed August 5, 1953. [18]

[Title of District Court and Cause.]

EXHIBIT No. 35

DEPOSITION OF IVAN F. PHIPPS

Taken on Behalf of Defendant, Pursuant to Federal Rules of Civil Procedure

Be It Remembered That, pursuant to the Federal Rules of Civil Procedure and the oral stipulation hereinafter set out, the deposition of Ivan F. Phipps was taken on behalf of the Defendant before Ira G. Holcomb, a Notary Public for Oregon, on the 15th day of September, 1952, beginning at 3:00 o'clock p.m., in the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances:

WILLIAM C. RALSTON,
Of Attorneys for Plaintiffs.

WALKER LOWRY,
Special Assistant to the Attorney General,
Appearing on Behalf of the United States of America.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Stipulation

Mr. Lowry: Mr. Ralston, may it be stipulated that all objections except as to the form of the questions are reserved until the time of trial?

Mr. Ralston: Yes, I so stipulate.

Mr. Lowry: Mr. Ralston, I do not expect to ask Mr. Phipps any detailed questions about the amount of his damages but, by failing to do so, I would not want to waive the Government's right to investigate that matter at some later time.

Mr. Ralston: Oh, no.

IVAN F. PHIPPS

produced as a witness on behalf of Defendant, pursuant to the Federal Rules of Civil Procedure, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Lowry:

Q. Will you state your full name? [2*]

A. Ivan F. Phipps.

Q. Where do you live?

A. 312-B East 12th Street, Vancouver, Washington.

Q. What business are you in, Mr. Phipps?

A. I am operating a motel, principally.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Did you practice law at one time?

A. Yes, sir; I did. I have not practiced law for the past several years; that is, I have not maintained an office, except at home.

Q. You are one of the plaintiffs in litigation against the United States on account of property damage in Peninsula Drainage District No. 2 in 1948? A. Yes.

Q. Do you represent yourself in that litigation or do you have some other lawyer?

A. No, Mr. Ralston and Mr. Crum and perhaps other attorneys represent my claims.

Q. In May and June of 1948 did you own property in Peninsula Drainage District No. 2?

A. Yes, sir; I did.

Q. In general, what sort of properties did you own?

A. My wife and I owned a warehouse property on what was then Northeast Bridgeton Road, now Northeast Marine Drive; also, a piece of property on the corner of Northeast Gertz Road and Northeast Faloma Road, which was occupied by a small nursery. [3]

I also had an interest in property which stood of record in the name of Warren Packing Company which I understand is involved as a claimant against the United States of America.

My wife and I also were stockholders in a corporation called the Northwest Properties, Incorporated, which owned property occupied by the

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Portland Meadows Motel. I think there were several other small pieces of property scattered throughout the District, but nothing on which any damage is claimed.

Q. You referred a few moments ago to the fact you operated a motel. Is this Portland Meadows Motel the one you referred to? A. Yes, sir.

Q. Can you tell me where the Portland Meadows Motel was located in June, 1948?

A. On the corner of Schmeer Road and North Denver Avenue.

Q. That would be at the southwest corner of Peninsula Drainage District No. 2?

A. That is right.

Q. Approximately how far was this motel from the Denver Avenue Underpass into Vanport?

A. I have never measured it, but I would imagine about 600 feet.

Q. Were you living at the motel in May and June of 1948? A. Yes, I was. [4]

Q. When did you acquire the Portland Meadows Motel?

A. We acquired the property in about 1939, as I recall. The motel was built in different sections. My recollection is that the first one was built about 1942 and that the larger sections were built in 1944 and 1945.

Q. Do you have any recollection of the approximate amount you paid for the property in 1939?

A. I believe it was $4,250.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. These improvements that occurred in 1942, 1944 and 1945, about what did they cost? Do you remember?

A. They ran in excess of a hundred thousand dollars, at that time.

Q. The bulk of the improvement work was done after the ring levee around the Denver Avenue Underpass was built?

A. I think that is right.

Q. Your damage claim, I take it, relates largely to the improvements rather than to the real property itself?

A. Yes, I think I would say the bulk of it would apply to the improvements.

Q. Are you claiming damages against the United States for damages to the warehouse property on Marine Drive? A. Yes.

Q. When did you acquire that property?

A. I can't remember, but it was prior to 1940, I would say.

Q. That property was located east of both Denver Avenue and [5] Union Avenue, is that right?

A. Yes.

Q. Subsequent to the time you acquired the property in 1940, or thereabouts, did you make some improvements on it?

A. Yes; I added a small addition to the building.

Q. When did that take place, about?

A. I would say about 1942.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Have you any idea what time of the year, in 1942?

A. Not without checking my records further. I was building a group of houses on North Bridgeton Road at the time, and I commenced these houses in 1941. I would say it was in the spring of 1942 that I completed the warehouse.

Q. Do you recall, roughly, what you paid for the warehouse property in about 1940, when you acquired it?

A. I do not have any recollection at the present time of what that purchase price was. I would have to refer to my records, which I do not have here.

Q. It was several thousand dollars?

A. It was in the neighborhood of $2,000.

Q. Do you have any idea what the improvements in 1942 or thereabouts cost?

A. Probably another $2,000.

Q. Were there any subsequent improvements in connection with that warehouse property?

A. No. However, the claim that I have filed also refers to [6] personal property which was in the warehouse.

Q. When was that personal property put into the warehouse, do you know?

A. Probably most of it was put in after 1942. It was building material which was drawn from and used. The bulk of that property was put in there within two years before the flood.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Within two years prior to the date of the flood? A. Yes.

Q. And, hence, after the Denver Avenue Underpass was built? A. That is right.

Q. You referred to some nursery property on Gertz Road? A. Gertz Road, yes.

Q. Are you making a claim against the United States on account of damage to that property?

A. I don't know whether that was included in the complaint or not.

Q. Perhaps you can tell me something about what it is.

A. I had probably $2,000 worth of nursery stock on that piece of property at the time the flood came, and it was destroyed, completely destroyed.

Q. Where was the nursery with reference to Union Avenue, east or west?

A. East of Union Avenue, across Gertz Road from the Columbia Country Club.

Q. Do you recall when you acquired the nursery property on [7] Gertz Road?

A. Again, I would have to give my best recollection. I would say it was about 1941.

Q. And you invested some money in the purchase of stock which you planted on that property?

A. That is right.

Q. About when did that take place?

A. It was planted there probably in 1944 or 1945.

Q. It was the same nursery stock which was

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

planted in 1944 or 1945 which was destroyed in 1948? A. That is right.

Q. Have you any idea what that property cost, the real property? A. I don't recall.

Q. In the neighborhood of a few hundred dollars, something of that sort, or more?

A. I believe I paid $1,100 for the property.

Q. What about the nursery stock?

A. The nursery stock probably cost me, maybe, $400 to $600 in total. Actually, the cost, of course, does not represent the value at the date of the flood because it had been taken care of and had grown substantially. I had some 600 camellia plants in the nursery worth at least $3.00 apiece, and some 50 rhododendrons of different variety and quite a number of other varieties of shrubs.

Q. You referred to the interest which you had in some property [8] standing in the name of the Warren Packing Company. Where was that property located?

A. It was located principally east of Union Avenue and occupied the central part of Peninsula Drainage District No. 2.

Q. Was it unimproved?

A. Unimproved, yes. It was farmland.

Q. Is the Warren Packing Company a corporation or partnership or what?

A. It is a corporation which held title to this property, as Trustee, for a time—Donaca and myself and Warren Packing Company.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Does your claim against the United States include a claim for damage to the property standing in the name of the Warren Packing Company?

A. That, as I understand it, is involved in a separate suit.

Mr. Ralston: Yes.

The Witness: That is a separate suit, isn't it?

Mr. Ralston: Yes.

Q. (By Mr. Lowry): Do you know about when the Warren Packing Company acquired the property in Peninsula Drainage District No. 2?

A. They acquired that in 1936.

Q. Was that property improved at some subsequent time?

A. Well, it was improved in that it was laid out into lots and streets were built through it and the property was in [9] cultivation; there were no buildings on it that we owned.

Q. When did this improvement by Warren Packing Company take place?

A. Well, it was continuous throughout the years from 1936 until the time of the flood.

Q. Do you recall, roughly, what the Warren Packing Company paid for the property in 1936?

A. It was in the neighborhood of $35,000. Part of that was paid by the assumption of taxes which were unpaid.

Q. Do you have any idea now what the cost of the improvements which took place in subsequent years was?

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. We spent a great many thousands of dollars on those improvements, especially on the roads, and I would say the bulk of the money was spent in surveys and roads.

Q. How was that property damaged by the flood, Mr. Phipps?

A. The single, most expensive thing we did was to put in a culvert across what is called Northeast Sixth Drive, and that was completely washed out, destroyed.

The main drainage ditch that ran down through the property washed out to the point where it was several hundred feet wide, whereas before it was about a hundred feet wide, and there was just general damage to the property. It is hard to estimate the value of the damage to the property, but it cost a tremendous amount to replace it to its prior condition.

Q. Mr. Phipps, have we now talked about all the physical [10] properties that you owned or had an interest in in Peninsula Drainage District No. 2, as to which you are making a damage claim against the United States? A. I think so.

Q. Were any of these properties insured in May and June of 1948? A. Insured?

Q. Yes. A. No.

Q. Not at all? A. Not at all.

Q. So you have not received any insurance payments on account of the flood damage at all?

A. No, none.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Were you in the Portland area in May and June of 1948? A. Yes, I was.

Q. Did you participate in any way in the flood fight at that time?

A. Yes. I was out there on the ground probably at least 12 hours a day during the entire period that the flood was occurring.

Q. What were you doing, in a general way?

A. I assisted to some extent in supervising the sand-bagging operations along North Bridgeton Road, through Faloma, and in front of the Columbia Country Club and the Portland Yacht Club [11] and I watched the bad spots in the dike.

Q. Would you say you were generally familiar with conditions around Peninsula Drainage District No. 2? A. Yes.

Q. Did you have any occasion to be on Denver Avenue at any time during the high water period?

A. Yes, I was.

Q. About when?

A. Well, I was out along Denver Avenue there, I would say, every day. We lived right on Denver Avenue and I was there.

I was very much concerned about getting a block put in the highway at the opening under Union Avenue and also in the underpass which ran into Vanport where the flood broke through.

I attended a meeting that was held at the Red Steer Cafe about a week or ten days before the flood was at its height, and I remember in particular

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

that I was on the ring levee with Mr. Diblee within a half hour after the break in the Vanport dike, discussing the possibility of getting that sandbagged, and when Mr. Diblee left me he was leaving to go out to the pit where they were digging sand for the protection of the dike, and I understood he was going to sandbag that dike at that time.

Q. Let me go back a minute. You referred to some sort of a meeting at the Red Steer Cafe? [12]

A. That is right.

Q. About when did that take place?

A. It was about ten days before the break, I would say. There were a number of landowners there. Mr. Skelton was there on behalf of the Highway Commission. I do not remember who was there in behalf of the United States Engineers, but there were representatives there at the time.

Q. Can you tell me how many people, all told, were there?

A. I would say 20 or more people.

Q. Do you recall any individuals other than Mr. Skelton?

A. There were a number of the landowners of District No. 2. I could be wrong, but I think Mr. John Krieger was there. I am pretty certain H. M. Seivert attended the meeting. I think Mr. Donaca was there with me. Mr. Frank Kernan must have been there. I do not recall too many of them. I know there were a good many people there and that we were all interested in the same thing, and that was

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

what help could be had in protection against the flood.

Q. How did you happen to go to the meeting, Mr. Phipps?

A. I was notified a meeting was to be held and I was much interested in the subject matter.

Q. Who conducted the meeting?

A. I don't remember.

Q. Who called it, do you remember?

A. No, I don't know that I could say. I don't remember who [13] called it.

Q. Do you remember that any representative of the United States whom you can now recall by name was present at the meeting?

A. My recollection is that Mr. MacKenzie was there. I would not want to swear to it because, as I say, I don't remember that he was there; but he did have some representatives there at the meeting who discussed the problems.

Q. Was this meeting principally a meeting of the property owners of Peninsula Drainage District No. 2? A. Yes.

Q. Do you remember in general what took place at the meeting?

A. Oh, yes. I think the reason the meeting was called was because of the underpass problems. They wanted some action taken by the Highway Department and the Government to protect against these holes in our dikes.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. When you are referring to the underpasses, you are referring to the one at the junction of Denver Avenue and Union Avenue and the second underpass leading into Vanport?

A. That is right. I was interested in both. I have always taken the position that neither the State nor the Government had any right to cut out a hole through Union Avenue, the Union Avenue fill, because we always considered that as a secondary dike or protection.

Mr. Ralston: You mean Union Avenue? [14]

The Witness: Union Avenue, yes. The people living between Union Avenue and Denver Avenue felt very strongly that the danger was great along the Oregon Slough, and we did not want any water that came through from Oregon Slough to go through that hole and get into the section between Union Avenue and Denver Avenue.

That was one of the questions that we were working on, and the other, of course, was the general protection of the underpass into Vanport.

I do remember one thing that always stood out as a part of the meeting and that was when Mr. Skelton, after we made a demand that the Highway Department take some action to protect these underpasses, said he had been advised by Salem that he wasn't to spend a dime on them, and I suspect they wish they had.

Q. Did Mr. Skelton make any explanation of Salem's position?

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. No; there was no explanation required. He just said they were not going to spend any money on them.

Q. He did not state why? A. No.

Q. You were talking a moment ago, Mr. Phipps, about water coming into Peninsula Drainage District No. 2 from Columbia Slough. You were referring to a possible break east of Union Avenue, is that right?

A. Well, east of Union Avenue. That is Oregon Slough. [15]

Mr. Ralston: Oregon Slough is what I believe you said.

Q. (By Mr. Lowry): In any event, you were talking about the possibility of water coming in east of Union Avenue and traveling west?

A. Through this area here (referring to map). We have always considered that the weaker dike. The dike along Columbia Slough has always been considered a very strong dike and one that we did not worry about at all, and the dike along the Oregon Slough is the one that always had been watched more carefully because it is not quite as high as the one on Columbia Slough.

Q. That is the dike on the north, isn't it?

A. That is right.

Q. If water came through the northern dike into Peninsula Drainage District No. 2, then, when it reached this portion of the Drainage District west

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

of Union Avenue, it would have, one way or another, to go through Union Avenue?

A. That is right.

Q. At that time, Mr. Phipps, what was the possible way that water might have gone through Union Avenue besides an outright break that you people were concerned about?

A. There were only two ways, one at a culvert which ran through Union Avenue at a point just westerly of the Portland Speedway property; the other was in the underpass that was made to carry Denver Avenue traffic to Vancouver, the northbound [16] traffic.

Q. That was at the junction of Denver Avenue and Union Avenue, at the northwest corner of the District? A. That is right.

Q. In May of 1948 was that underpass open?

A. The underpass was open until, I would say, probably two days before the flood actually broke through into the District, when I was finally able to convince the officials in charge at that time—I think principally Mr. Diblee and his superiors—that that should be sandbagged, and it was sandbagged. Sandbags were put in there almost up to the Union Avenue roadway elevation.

Q. Do you know who put them in?

A. I took the responsibility of ordering the sacks for it and had them brought out, and I think the U. S. Engineers hauled some sand there. I would not want to say for sure, but I believe they did; I

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

think they hauled some and I think the District bought sand.

Q. That is, Peninsula Drainage District No. 2?

A. That is right.

Q. Who paid for the sacks?

A. Peninsula Drainage District No. 2 paid for them.

Q. After the failure of Denver Avenue, did the sandbagging along Union Avenue go out, do you remember?

A. No, that was just sitting in still water after the flood [17] came in.

Q. Where was the failure on Union Avenue?

A. The failure on Union Avenue was here at the point of this culvert that washed out the wrong way. I think they had put sheet piling in the east end of the culvert to protect it in case the river dike went out, and the water came in from District No. 1 and washed right through it.

Q. The sheet piling was on the eastern end of the culvert? A. That is right.

Q. So it was put there in the expectation the water would come from the east, is that right?

A. Yes.

Q. And, instead, it came from the west?

A. Yes.

Q. Mr. Phipps, when you were discussing the sandbagging under Union Avenue at the underpass, were you principally concerned then with water coming from the east?

A. Well, I figured that it would work both ways;

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

in other words, there were two sections, and if one was flooded we wanted the other one saved. That was the principal reason. As I say, we thought there were some spots that would hold up—I thought they would probably have held up indefinitely, but there were a couple of spots that we considered fairly weak spots, and we watched them very carefully.

Q. At this meeting at the Red Steer Cafe do you recall any [18] specific discussion of the Denver Avenue Underpass into Vanport?

A. Yes. We were asking that they take care of both of those, and we suggested that they sandbag that underpass completely.

Q. That was never done, as I understand it?

A. It was never done. If they had spent $10,000 sandbagging the underpass there, it probably never would have gone through.

Q. How did it come about you ordered sand and sandbags for the Union Avenue Underpass and not for the Denver Avenue Underpass?

A. Well, I don't know. As I say, after all, we did not have any particular fear of a break in the dikes around District No. 1. Of course, everybody at that time figured if any water ever did get in there that little levee would just crumble; it had no value at all. It was just sand and was very small in comparison with the dikes around both Districts and it had a four-foot crown whereas the crown on both of the other dikes was 12 feet, as I recall.

Q. The reason the Union Avenue Underpass got

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

preferred attention was because, as you say, people were concerned with the possibility of water coming from the east and moving west?

A. That is right.

Q. Was there any meeting, subsequent to that meeting in the Red Steer Cafe, which you attended and which had to do with flood problems?

A. Well, no formal meeting of any consequence except that we [19] were meeting on the dikes all the time. We had continuous discussions with Diblee and with the supervisors of the District and representatives of the Sheriff's office about various problems out there, and I was, of course, more active than anybody else particularly in trying to get them to do some work on those underpasses because I figured there was a real danger.

Q. You brought this problem to the attention of the District supervisors in addition to Mr. Diblee and others?

A. Oh, yes. And the District supervisors, of course, had the problem pretty well in mind all the time, but the District's finances were not sufficient to permit them to spend a tremendous amount of money, and they were careful of the amount of expenditures, and they wanted to be sure that the money was required before they spent it.

Q. You also say you brought the problem to the attention of the Oregon State Highway Commission? A. Yes.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Or to the attention of Mr. Skelton, is that right?

A. Yes. I don't know who arranged for that meeting with Skelton, but Skelton was one of those who attended. I think there were other representatives of the Highway Department there, too, but I can't remember who they were. Frank Kernan would probably remember. I have a very clear recollection that Frank Kernan was there and up on his feet making demands, shall [20] I say.

Q. Did you feel that those underpasses were, to some extent at least, the responsibility of the Highway Department?

A. I understood that the Highway Department had built them. I didn't know at the time that they had been built by the Highway Department for the Federal Public Housing Authority, but I understood later that they were.

Q. At the time we are talking about, it was your impression that both the Union Avenue and Denver Avenue Underpasses had been built by the Highway Department?

A. Yes, I understood that they were.

Q. And you felt that they had some responsibility to see to it that the underpasses did not destroy the effect of Peninsula Drainage District No. 2?

A. That is right. Under the law there is no provision for bringing suit against the Highway Department, or we certainly would have enjoined

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

the Highway Department because I think they were as much at fault as the United States Engineers or the Federal Public Housing Authority.

Q. Mr. Phipps, at any time prior to the day of the failure at the Denver Avenue Underpass were you out on that ring levee? I am talking about the flood period prior to the failure.

A. Well, I don't think I was actually upon it. Just after the flood broke into Vanport I was with Diblee and we went over. I think at that time we were over at the Columbia Slough. [21] I either hunted Mr. Diblee down and took him with me or he was there and we went together, but, anyway, I went over with him and we went on the ring levee, actually walked out on it and looked at it.

Q. This was when?

A. It was on the day of the flood.

Q. May 30, 1948?

A. May 30th, I guess it was, yes. It was on Memorial Day. Before that I think probably I just passed by and looked at it; there was no particular occasion to walk on it.

Q. But on May 30th you were actually on it?

A. That is right.

Q. For the express purpose of making an inspection? A. That is right.

Q. Will you tell me in as much detail as you remember just what you saw?

A. Well, water was beginning to creep up on the underpass, and we didn't see anything different then

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

than the day before, except that water was filling Vanport. I don't think the water at that time was over four or five feet deep in the underpass.

Q. You were along the crown of the levee, as I understand it? A. Yes.

Q. Do you remember whether you walked the full length of the crown of the levee? [22]

A. I wouldn't say I walked the full length. I didn't get out to the north end of it but we walked on it from the south end and probably went out half way.

Q. Do you recall looking down the slope of the levee on either side? A. Yes.

Q. Do you remember whether or not those slopes had been seeded? Was there grass growing along them?

A. I think there was a little grass. As I recall, it never did have very much of a crop of grass, because there wasn't very much for it to grow in.

Q. Looking down these slopes, did you see any cracks or breaks in the levee at any time?

A. No, I don't remember that.

Q. Do you recall seeing any cracks or breaks in the levee along the crown?

A. I don't think so. I don't remember.

Q. You would have noticed, I presume?

A. I would have noticed anything of any size. I don't believe there were any serious cracks in the levee itself. It was more the make-up of the levee and the size of it that was dangerous.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. I understand that after the water rose in the underpass a boil developed at the very toe of the slope and water started to gush out. Had that begun at the time you were out there?

A. No. It may have begun, but there wasn't anything of that [23] kind that was noticeable. Of course, as I say, that was within a half hour after the break, or very shortly after the break, and there probably would not have been any water coming out at that time. If there was, they would have been very minor.

Q. Did you, on this inspection trip, get down along the toe of the levee on either side?

A. No.

Q. But, at least, as far as you can recall now, you did not see anything unusual or anything which directed your attention to it when you made that inspection?

A. No. The only purpose of going over there was to try to get the Engineers to sandbag the dike. I did not have any objections to the condition that the dike was in. I just figured it was no good.

Q. By "sandbagging the dike," you mean putting additional sandbags on the ring levee?

A. No; sandbagging the dike itself. I figured they should have at least two layers of sandbags on the whole surface, the inside surface of the dike.

Q. In other words, down the slope?

A. That is right.

Q. And you recall discussing that problem with

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Mr. Diblee? A. Yes, sir; I do.

Q. Do you remember what was said?

A. I thought he was going to do it. When he left, he seemed [24] to be of the notion that that should be done, and he said he was going up where they were loading sand up there, back of Kenton, and I was out there later on in the evening and I noticed nothing had been done.

Q. Did you at any time after the Vanport failure discuss this proposal of sandbagging the ring levee with anyone other than Mr. Diblee? A. No.

Q. You did not mention it to the Board of Supervisors?

A. We talked about it, yes. Of course, I told them I was going to try to get the Engineers to do that work. We did not have any facilities for handling that kind of a job.

Q. By the "supervisors," you mean Mr. MacKenzie and Mr. Donaca?

A. Yes. We would have furnished sacks or anything that was necessary, if they would just say what they wanted.

Q. Were you along Denver Avenue at any time after this inspection made by you and Mr. Diblee and prior to the actual failure on Denver Avenue?

A. Just that one time, in the evening.

Q. Where did you go then?

A. To the same places we were before; just walked out there on the ring levee.

Q. That is the second trip you are speaking of?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. That is the second trip, that same evening.

Q. Who was with you then? [25]

A. I was with a man who was doing some electrical work for me, as I recall. I think that is who it was. I was with one of my workmen. I believe it was Ralph Turner.

Q. Had there been any change in conditions around the ring levee that you could see then?

A. No.

Q. Had the water begun to boil up along the toe?

A. With the dike in the condition it was at that time, it would be hard to tell. As I recall, it was along in the early evening, after it was beginning to get fairly dark.

Q. Were people working on the ring levee at that time?

A. Not that I saw. It was completely vacant.

Q. Did you go to the location along Denver Avenue where they were having some trouble with water coming through an old culvert?

A. Yes. I remember that and knew about it. That had been stopped some time before. I did know the circumstances regarding that.

Q. Did you personally see the work that was done at that culvert location?

A. I saw it after it was done. As I recall, they covered the side of the west slope on Denver Avenue with some landing nets, as I recall.

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Did you go up to the site of the Denver Avenue-Union Avenue junction to see what was being done up there? [26]

A. Not at that time, no. There was no point in it.

Q. Mr. Phipps, I gather from what you say that you felt there was an improper failure on someone's part to sandbag the ring levee.

Was there anything else that happened after the Vanport failure and before the Denver Avenue failure that you felt should have been done that was not done?

A. No. I don't think there was anything else that looked like it had any serious aspects, except that. We always felt that the dikes as a whole were sound. Of course, they were awfully wet at that time. As I say, they were all holding and they looked like they were in reasonably good shape. There wasn't anybody very comfortable about them, however.

Q. Prior to the failure of Vanport itself, had you had any reason to think that there might be a failure of the Vanport levee? A. No.

Mr. Ralston: For the record, which levee are you referring to?

Mr. Lowry: I was just wondering if Mr. Phipps had seen any reason to anticipate Vanport itself would have been flooded at any time prior to the time it actually was.

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Mr. Ralston: Are you talking about the railroad fill?

Mr. Lowry: No, the levee around that.

A. I think I said earlier in this deposition that we had not [27] felt any serious danger would develop from the dikes around Peninsula Drainage District No. 1. As a matter of fact, I was one of the supervisors of Drainage District No. 1 at the time the dikes were rebuilt by the United States Engineers in 1941, I believe it was, and we felt that those dikes were pretty sound. That is probably one reason why we did not complain later on about this ring levee, because we didn't figure that the water was apt to come in from there.

Q. Now, Mr. Phipps, I would like to ask you a few questions about your personal association with these two Drainage Districts.

You have just said that for a time at least you were a supervisor of Peninsula Drainage District No. 1? A. Yes.

Q. Were you a property owner in Peninsula Drainage District No. 1 at one time?

A. Yes, I was.

Q. From about when to when?

A. I believe it was in 1939 that Mr. Donaca and I arranged to buy all the remaining property of the Peninsula Industrial Company in Peninsula Drainage District No. 1. I could get the exact date, but I believe it was in 1939. We purchased that property and it was of record. I think it was of record

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

in the names of myself and my wife, Donaca and his wife, and Mr. and Mrs. E. W. Peake. [28]

Q. You held that about how long?

A. We held that until 1942. We made two sales of the property. I think the actual sale finally developed as a transaction with the Federal Public Housing Authority. Our initial conversations were with the Maritime Commission, but I think before the deals were completed the Federal Housing Authority stepped in and took over the Vanport area.

Q. Were you an officer of Peninsula Drainage District No. 1? A. Yes, I was.

Q. For how long, roughly?

A. About three years.

Q. Beginning about when?

A. In 1939, beginning with the time that we purchased the property. The officials who were in at that time were officers of Swift & Company and they retired and we took over, and we continued in office there until the time that we sold out to the Government.

Q. Have you been an officer of Peninsula Drainage District No. 1 since then? A. No.

Q. Were you at one time attorney for Peninsula Drainage District No. 1, or one of its attorneys?

A. I was. I acted as attorney for Peninsula Drainage District No. 1 for a great many years. I was employed by Carey & Kerr, Attorneys, and they represented both Peninsula Drainage [29] Dis-

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

trict No. 1 and Peninsula Drainage District No. 2. I handled most of their legal matters from about 1924 until 1936.

Q. As a matter of fact, you did some law work for these Drainage Districts after 1936?

A. In 1936 I left the firm of Carey & Kerr, and then I took over again when we acquired the property.

Q. Beginning about 1939 or thereabouts?

A. I would say about 1939. I was only off a short time. I think it was in 1937 that I came back in representing Peninsula Drainage District No. 2, and in 1939, I guess it was, I came back in representing District No. 1.

Q. Have you, since then, been doing some legal work off and on?

A. I did a very small amount of work for them in—I think it was about 1946 or 1947. At that time they employed Mr. William C. McCulloch. I forget just when it was. I was down at Seaside quite a bit of the time and I just gradually dropped out.

Q. But you were the lawyer for Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2 in 1942, 1943 and 1944, or a lawyer for them?

A. Yes, I would say so.

Q. Were you ever a supervisor or officer of Peninsula Drainage District No. 2?

A. No. [30]

Q. Did you ever have any connection with that Drainage District, other than as an attorney or member? A. No; just as attorney.

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Could you tell me in general, Mr. Phipps, the purposes for which Peninsula Drainage District No. 2 made levies or levied assessments on District landowners?

A. Yes. They levied assessments for the purpose of bringing in ditches, repairing ditches, building new ditches, repairing the dike and rebuilding the dike, and, of course, servicing of bonds and miscellaneous services.

Q. About what would those assessments come to per year? Do you have any idea?

A. They varied. I would say up until the time that we acquired property in the District the tax levies were quite high. As I remember, they ran as high as $16 an acre for a year, and when we acquired the bulk of the property, so that we could more or less control the affairs of the District, we stopped the spending of so much money and the taxes were cut down to near the $7 or $8 bracket. I think in about 1942 or 1943 they finally adopted a flat fee of $10 an acre a year, and I think we have been assessing approximately that amount each year.

Q. That would produce seven or eight hundred dollars a year? A. No.

Q. No; seven or eight thousand? [31]

A. We had about 1,300 acres in Peninsula Drainage District No. 2. It would be about $13,000. There were special levies throughout a period of years. I remember in 1928 there was a flood threat and the District at that time—I, as attorney, prepared a

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

petition to the County Court to amend our plan for reclamation, and went through all the formalities of increasing the height of our dikes which, in the original program, were set at 28 feet. We had the height of the dikes increased to 32 feet, I believe it was, in that amendment, and I believe we increased the bond issue or put a supplemental bond issue out and spent that in rebuilding the dikes. That was at the District's expense and it ran to quite a considerable amount.

Q. Mr. Phipps, do you recall when this Denver Avenue Underpass into Vanport first came to your attention?

A. I think it was just about the time that we sold to the Federal Housing Authority, or it was immediately afterwards. The thing moved very fast.

Q. Did you take any action on behalf of either Drainage District with respect to the underpass, that you can now remember?

A. I took it up with the State Highway Department. I made objections, both orally and in writing, to the Highway Department with reference to the underpass. I maintained the Highway Department had no right to cut a hole in our dike, and I always understood that Denver Avenue was one of the dikes of the District. [32]

Q. Were you taking this position on behalf of Peninsula Drainage District No. 1?

A. I personally took it on behalf of Peninsula Drainage District No. 1, in writing a letter to Mr.

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Baldock's attention, but the reason for that was that Mr. Boyles was instructed to take similar action in behalf of District No. 2. Whether he did or not I don't know, but I assume he did, because he was certainly instructed to do that.

Q. Instructed by whom?

A. The Board of Supervisors of Peninsula Drainage District No. 2.

Q. At a meeting that you attended?

A. Yes.

Q. What position did the Highway Commission take with respect to the Denver Avenue Underpass and your protest?

A. They wrote a letter and said Denver Avenue was not a dike and that they would not accept it as such, notwithstanding the fact that the Circuit Court here had said that it was. I argued with Mr. Devers about it and argued with Mr. Baldock about it, but I could not seem to convince them that they had to do anything about it.

Q. What were you suggesting they should do, Mr. Phipps?

A. Well, as I understood it, the only way they could cut that hole in the dike was to get authority from the Court, because that is what the law says, that if you want to amend your plan [33] of reclamation you go to the Court, and they just short-cut that, because they thought they were in a big hurry. Anyhow, they would not do it. They probably could have satisfied us by putting a satisfactory dike

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

around the ditch. I don't know if everybody would have been satisfied or not, but if they had had a dike that was equal to this other dike, I assume we would have been satisfied.

Q. You took this problem up with the Oregon State Highway Commission more or less at the time the underpass was built? A. That is right.

Q. Did you at that time take this problem up with any representative or agency of the United States?

A. I don't believe I did because, as I told you before, I understood that this work was being done by the Highway Department; I didn't understand that it was being built for the Federal Public Housing Authority and, consequently, I made my complaint to the Highway Department.

I am reasonably certain the entire problem was discussed with representatives of the U. S. Engineer's office, but, there again, they did not take any position in the matter.

Q. You say you are reasonably certain you did not discuss it then?

A. No; I did not discuss that myself with them. I don't believe I did. I can't really remember.

Q. You do not recall discussing the problem of the underpass [34] with any representative of the United States? A. No, I do not.

Q. Were any plans for the underpass itself provided to permit Drainage District No. 1 and Peninsula Drainage District No. 2?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. Yes, I am sure they were. I think I still have a copy.

Q. Were the supervisors of these two Drainage Districts familiar with those plans and what was contemplated by the Highway Department?

A. I think so.

Q. At any time while the ring levee was under construction do you recall taking any action on behalf of Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2 with respect to the ring levee?

A. No; not except in the correspondence I had with the Highway Department and in my talks with Highway Department officials.

Q. Of course, that correspondence and those talks related primarily to the underpass?

A. That is right.

Q. What I was wondering about was, once the ring levee got under way, did Peninsula Drainage District No. 1 or Peninsula Drainage District No. 2 take any position as to how it should be built or whether it was being built properly or anything of that sort, at the time the building was going on?

A. I don't remember that we did after the job was constructed. I believe we objected to the size of the dike at the time the [35] plans were submitted.

Q. I might be misinformed, but I do not believe the plans of the Oregon State Highway Commission

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

refer to the dike at all. I say that only to refresh your recollection.

A. That is probably right.

Q. What I am wondering is if you recall any specific discussion or whether any specific letter was written on behalf of either Drainage District which referred specifically to the dike or to the plans for it or anything of that kind?

A. I don't think so. I don't remember it at the moment, at least.

Q. Did you, on your own behalf, discuss with anyone the plans for or the construction of the ring levee? A. No.

Q. Were you in the neighborhood at the time the ring levee was being built? A. Yes.

Q. Did you see the construction work that went on there?

A. I remember where they got the fill material and I saw it coming in there, and I thought it was very poor material. As a matter of fact, it was just sand that came off a sand island over there.

Q. Did you see how the construction was being done?

A. I wouldn't say that I watched it too carefully, but I did see it being built. [36]

Q. By dump trucks?

A. Yes. It was trucked in.

Q. As I understand, the ring levee was first completed in the spring of 1943 and then some further work was done on it in the fall of 1943 which con-

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

sisted principally of placing a clay blanket on the outside? A. Yes.

Q. Did you see that work being done?

A. I probably saw it, but I don't remember whether I watched it with any detail. I think the transaction between the District and the Engineers was largely carried on with Mr. MacKenzie. However, I think Mr. Donaca might know something about it.

Q. Anyway, you, yourself, did not participate in it?

A. I was very much tied up; I was building a group of houses; I was working on that practically without stopping.

Q. At any time prior to when this ring levee was first finished and when you went out on it with Mr. Diblee on May 30, 1948, do you recall making any inspection of the ring levee yourself?

A. Not with the idea of making an inspection. I saw it; I knew what it was; I saw what it looked like.

Q. Do you recall any time during the construction of the ring levee or thereafter and prior to the flood period in 1948 any discussion you had with any of the supervisors of either Drainage [37] District about that ring levee?

A. I do not have any recollection at the present moment.

Q. Do you recall whether or not the supervisors knew about the ring levee?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. Oh, they knew about the ring levee, yes.

Q. Did they know, in general, how it was built?

A. I think so. I might say this: Our supervisors —I wouldn't say all of them, but I believe one and I think two of them—felt anything the Highway Department built or anything the U. S. Engineers built was adequate. I did not always take that view myself, but that was their position, and I suppose for that reason they did not make as much of a complaint as they would have otherwise.

Q. But that is your impression, that they knew in general how it was built? A. That is right.

Q. Of course, they could tell what size it was by looking at it? A. Yes.

Q. I want to show you what seems to be a copy of an agreement between the United States of America and Peninsula Drainage District No. 2, under date of April 29, 1944. Have you seen that agreement before?

A. Yes. I am not too sure, but I think I took part in the negotiations resulting in this agreement. I don't know whether [38] I drew that or not—I think this was probably drawn in Seattle, but I am not sure.

Q. Will you read the first paragraph to yourself? Then I want to ask you some questions about it. A. Down here (indicating)?

Q. No; this part here. A. I see. Yes.

Q. I call your attention particularly to section 7:

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

"The District further agrees to provide additional services in connection with the drainage of the project and protection thereof against overflow and flood waters, upon the written request of FPHA; such services to be billed to FPHA at the actual cost thereof to the District and FPHA agrees to pay for such additional services at the cost thereof to the District."

Do you recall any discussion or any negotiations relating to that provision?

A. No, sir; I do not. I think that was just more or less of a formal provision put in there by the attorneys for the Government.

Q. As far as you know, that does not relate to any special problem of the District?

A. No, I don't think so. I can't remember anything that FPHA ever indicated that they wanted done. I figured it was just a [39] protection in case they did want to get something done. I suppose they were thinking that maybe some day there might be a flood come from the other direction and they wanted the District to give them some protection from flood waters from the other side.

Q. That is just speculation; you don't know?

A. Yes, just speculation.

Q. Do you recall after the Vanport failure an order was made by the Governor of Oregon to evacuate Peninsula Drainage District No. 2?

A. Well, I don't know that it was actually the

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Governor. I know that the Sheriff's office was very insistent that everybody get out of there.

Q. Did you make any effort, either in response to suggestions of the Sheriff's office or otherwise, to remove any of your property from Peninsula Drainage District No. 2?

A. Yes, we took out substantially all the personal property that was movable.

Q. When did you do that?

A. Within two days before the flood, I expect.

Q. You had done this before the Vanport failure?

A. Before and after. The bulk of the stuff was taken out after the Vanport failure and before the failure in District No. 2.

Q. Did you get out everything that it was physically possible [40] to take out, as far as your property was concerned?

A. Well, we got a very substantial part of it. There was some additional property that could have been taken out, but we just didn't have the time to get it out.

Q. How were you doing this?

A. We had, I think, two big trucks working and a crew of the boys that were working. We had one more load of stuff that should have come out of the motel, but it was about 10:00 o'clock at night and we were just too worn out to get it.

Q. In any event, you made a real effort to move what you could?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. We took out everything that we could get.

Q. I want to be sure, Mr. Phipps, that I am right in my understanding. You personally did not have any discussion with any representative of the Army Engineers concerning either the underpass along Denver Avenue or the ring levee around it at any time prior to the conversation with Mr. Diblee which you have told me about?

A. I don't remember any conversation that I had.

Q. Do you recall having any such discussion with any representative of FPHA? A. No.

Q. Do you recall having any such discussion with any representative of the Housing Authority of Portland?

A. No. The only discussion I could have had would have been [41] with the Army Engineers. We were talking to them all the time; we knew them very well, and Donaca and I were talking to them all the time. The subject may have come up, but I don't recall any specific instance. I know that we considered it to be a very poor dike and that we made a lot of comments about it. We probably told the Engineers about it some time during that period.

Q. But you do not recall any specific discussion?

A. No, I don't.

Q. Do you recall at any time prior to the actual flood period you ever suggested to any representative of the United States that the United States

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

had any responsibility for the Denver Avenue Underpass or the ring levee around it?

A. No. I didn't understand that they had anything to do with it.

Q. Do you recall that any such suggestion was made by any representative of Peninsula Drainage District No. 2?

A. That is something I couldn't say. I don't know of any.

Q. You just don't know?

A. No. I do know this, that Mr. MacKenzie and Mr. Donaca were discussing that on behalf of District No. 2. I, as attorney, did not take any part in it.

Q. Mr. Phipps, I want to show you what appears to be a photostatic copy of the minutes of the annual meeting of the landowners of Peninsula Drainage District No. 2 for October 26, [42] 1942. I notice on the second page there is a paragraph beginning, "Considerable discussion ensued," and so on.

A. I don't know what it means, to tell you the truth about it.

Q. Do you recall being at that meeting? You are listed as being in attendance.

A. Yes. I was there. I think I attended all meetings, as far as I recall.

Q. Do you have any recollection at all of the discussion to which the paragraph I referred to relates?

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

A. Yes, I remember the discussion. They were discussing the question of the underpass, but I don't remember anything that sounds like this.

Q. What do you remember about what was said?

A. I know, for one thing, that they were talking about who was going to pay the taxes on that four and a half acres that was involved in that underpass area, and I know that they discussed, generally, the question of the undesirability of putting that underpass through Denver Avenue, but just what this indicates there—I don't know what it means.

Q. You do not recall any details of the discussion?

A. No, just in general, that we rather objected to the fact that this was being built.

Q. Let me show you the minutes of the meeting of the Board of Supervisors of Peninsula Drainage District No. 2 for November 30, 1942. I notice that the minutes show you in [43] attendance. Then there is a reference on this first page to the underpass.

I want to know whether you recall anything that took place at that meeting on that subject?

A. As I recall, and as it is indicated in the minutes, the discussion was with reference to putting that levee around there. I have a very clear recollection that we were demanding some protection in the form of a levee, and I guess the levee that was put in there was the final result.

I believe, however, Mr. Boyles is the one who

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

wrote the letter. Right now I don't remember whether I wrote one or not.

Q. Let me show you the minutes of the meeting of April 19, 1943, particularly the paragraph at the bottom of the first page. A. Yes.

Q. Do you recall that particular discussion?

A. No, I don't. I will say that these discussions were just general. Every time we had a meeting we talked about it. This would indicate that maybe our first discussions regarding the opening through Denver Avenue may have occurred at this time instead of at that last meeting.

Q. I think these minutes are later.

A. This is the later one, is it?

Q. I notice in the April, 1943, minutes there is a reference [44] to stop logs. Do you recall any conversation on the part of the Board of Supervisors about a stop-log structure through the Denver Avenue Underpass?

A. That was one possible solution of that thing. The reason they talked about stop logs was that the United States Engineers had set up other crossings, particularly in District No. 1. In District No. 1, I think there were two road crossings that were provided with stop logs in lieu of dikes. One would have gone across Swift Boulevard around in front of Swift & Company's plant, and the other was under the railroad. There is a road, I think, called Suttle Avenue that goes under the S. P. & S. railroad fill, and that was provided with stop logs. That

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

would have been one way to have taken care of that opening under Denver Avenue.

Q. In these discussions which took place at meetings of the Board of Supervisors of Peninsula Drainage District No. 2, with respect to the Denver Avenue Underpass, was there any suggestion that the District itself might do something in the way of providing flood protection in that area?

A. Well, it was always discussed, and I think they always felt that, since the United States Engineers had, under the Flood Control Act of 1936 or 1937, been willing to make these improvements, they should try to get the Engineers to keep it up rather than spending their own money, because that kind of work would create such a burden on the District. [45]

Q. It was at least considered?

A. Oh, yes. They always had it in mind that in case of an emergency they would have to pay the bills.

Q. Mr. Phipps, before we began your deposition I showed you some letters that appear to have been sent by you to the Oregon State Highway Commission. A. Yes.

Q. Do you think you have, anywhere in your files, any writings at all relating to the Denver Avenue Underpass or the ring levee which we have not, one way or another, looked at today?

A. The only things that might be available—I don't know where they would be at the moment—

(Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

would be some letters that I might have written in behalf of District No. 2. On the other hand, I think my conversations were verbal with the exception of this letter that I wrote as President of Peninsula Drainage District No. 1.

Mr. Lowry: Mr. Ralston, I wonder if we could have an understanding that Mr. Phipps may look for any such correspondence that exists and, if he finds it, that photostatic copies may be made?

Mr. Ralston: Yes. I have already asked Mr. Phipps to make a further search and, if possible, produce any further writings that he may be able to locate.

Mr. Lowry: And, if he finds any such writings, the Reporter may mark them in order as exhibits beginning with [46] P-1 and we will have photostats made to be attached to the deposition.

Mr. Ralston: That is satisfactory.

The Witness: I will make an effort to find any such writings.

Mr. Lowry: I have just one other question, Mr. Phipps: We are trying to locate people who might be thoroughly familiar with the condition of this ring levee from the time it was constructed until it failed on June 1, 1948.

Do you have any suggestions about people who might know about its condition during that period?

A. Well, I imagine you have in mind anybody who would know. Frank Kernan always claims to know everything that there was to know about this

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

particular levee and I think Tom Donaca was familiar with it in general, and so was I. We were wondering why they put sand in a dike like that.

Q. Is there anyone else you can think of?

A. I don't know of anybody else. Seivert might possibly know something about it.

(Discussion off the record.)

The Witness: I don't think you will find anybody being particularly concerned with it at that time, because we always figured the dikes of District No. 1 were very sound.

Q. (By Mr. Lowry): I gather from what you have said here today that your principal grievance against the Government is that [47] you feel the Government, having removed whatever protection Denver Avenue provided by building an underpass, was then somehow obligated to provide adequate protection around the underpass?

A. I think it was a completely illegal act to have put a hole in there, in any event, without complying with the Oregon statutes, and, of course, I feel in building a protective dike around the underpass it should have been made equal to Denver Avenue, which was 150 feet through at the base and 90 feet across at the top. As I suggested before, if they had built a dike that was equal to the dike around the District we probably would have been satisfied. We certainly have a complaint coming because they did not protect it.

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

Q. Did you ever see any report made by the Corps of Engineers at all of an inspection which is supposed to have been made in the fall of 1944 by the Corps? A. No.

Mr. Lowry: I think that is all the questions I have.

Mr. Ralston: I have no questions at this time. You understand, of course, I will probably want him as one of our witnesses.

Mr. Lowry: Yes. Mr. Phipps, the Reporter will write this up and give you a chance to look it over and then will you sign it?

The Witness: Yes. I will say, in the meantime, if I can [48] find anything further, I will produce it. My files have been stored down at Seaside ever since about 1945. Undoubtedly some have been lost by virtue of the fact that they have been moved so many times. The Navy pushed me out of my office twice.

And Further Deponent Saith Not.

[Seal] /s/ IVAN F. PHIPPS. [49]

Notary's Certificate

State of Oregon,
County of Multnomah—ss.

I, the undersigned, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

15th day of September, 1952, before me as such Notary, at the Grand Jury Room, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time mentioned in the caption set out on Page 1 of the foregoing transcript Ivan F. Phipps, a witness produced on behalf of the Defendant.

Mr. William C. Ralston, of Attorneys for Plaintiffs, appearing in their behalf, and Mr. Walker Lowry, Special Assistant to the Attorney General, appearing on behalf of the United States of America; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but [50] the truth, and being carefully examined, in answer to all interrogatories propounded by the Special Assistant to the Attorney General, testified as in the foregoing annexed deposition, Pages numbered 1 to 49, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or

Exhibit No. 35—(Continued)

(Deposition of Ivan F. Phipps.)

substance; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 4th day of August, 1952.

[Seal] /s/ IRA G. HOLCOMB,
Notary Public for Oregon.

My commission expires Aug. 4, 1956.

[Endorsed]: Filed August 5, 1953. [51]

EXHIBIT No. 66

NPP 824.02(Col R-1948)-30.12

Completion Report
1948 Columbia River Flood Fight
Peninsula Drainage District No. 2
Multnomah County, Oregon

I. General Description

A. Location

Peninsula Drainage District No. 2 is located on the left bank of the Columbia River, extending from

Exhibit No. 66—(Continued)

Mile 106.5 to Mile 108.5 above its mouth, lies in portions of Sections 2, 3, 4, 9, 10 and 11 of T. 1 N., R. 1 E., of the W.M., and Sections 33 and 34 of T. 2 N., R. 1 E., of the W.M., and is bounded as follows: on the north by the Columbia River, on the east by a portion of Columbia Slough (which was dredged through original high ground to provide sufficient material to construct levees on each bank thereof and to also provide a connection of Columbia Slough with the Columbia River); on the south by the original Columbia Slough and on the west by Denver Avenue, which is an Oregon State Highway embankment that acts as a dividing levee between Peninsula No. 1 and No. 2 Drainage Districts. (See Corps of Engineers Dwgs. No. CLW-107-3/1 to CLW-107-3/7, inclusive, and CLW-107-4/3, attached as exhibits hereto.)

B. Status of Protective Works (See Attached Exhibit)

1. Levees—

a. Front levee (Columbia River side). The front levee extends an approximate total distance of 10,400 feet easterly from U. S. Highway No. 99 (Interstate Bridge approach) along the left bank of the Columbia River to a junction with the Columbia Slough levee near the location of the Columbia Edgewater Clubhouse. This stretch of levee is comprised of three sections, described as follows: Interstate Bridge approach to Faloma, approximately

Exhibit No. 66—(Continued)

3,200 feet in length, being a sand levee with 12 foot top width, 1 on 3 landside slope, with a net levee grade ranging from 33.3 to 33.4 feet above low water datum which provides a 3-foot freeboard above the 1876 high-water profile, and a riverside slope of approximately 1 on 2 as the levee was built very close to the original river bank, (see Dwg. No. CLW-107-3/5); Faloma to Portland Yacht Club. Original levee on which a two-lane oiled roadway was built (forming 4,760 feet of Marine Drive, a Multnomah County Road, having a net grade elevation varying from 32.6 to 32.9 feet above low water elevation and being approximately 2.1 to 2.4 feet above the 1876 highwater profile; with approximate side slopes of 1 on 2 and containing therein two sections of concrete flood wall of 346 feet and 610 feet, respectively, built to elevations 32.5 and 32.6 to provide protection across low profile sections of the roadway embankment, (see Dwgs. CLW-107-3/5 & 6); Portland Yacht Club to Columbia Slough. This section of the front levee approximately 2,440 feet in length, is quite high and wide, ranging in elevation from 2 to 5 feet above the 1876 high-water profile and being of such width that many residences are built thereon. This additional size is due to the placing of a hydraulic sand fill several years ago on the original ground riverward of Marine Drive which lies adjacent and parallel to the high sand levee but is of a variable height that ranges from an approximate elevation

Exhibit No. 66—(Continued)

of 30 to 32 feet above low-water datum, (see Dwg. No. CLW-107-3/6).

b. Columbia Slough Levee. This levee, approximately 17,600 feet in length, extends from the northeasterly corner of the district along the right bank of Columbia Slough throughout the easterly and southerly sides of the district to a junction with the Denver Avenue fill at the southwesterly corner of the district. This levee was reconstructed by the Corps of Engineers in approximately 1939 to a height varying from elevation 33.7 at the northeasterly corner of the district to elevation 33.3 at Denver Avenue, a top width of 12 feet and side slopes of both 2.1 and 3.1 and combinations thereof on both the landside and riverside. (See Dwg. No. CLW-107-3/6 and CLW-107-4/3.)

c. Denver Avenue Fill. The Denver Avenue embankment, part of an Oregon State Highway, is a hydraulic sand fill, constructed for road purposes only, extending from Columbia Slough northerly a distance of approximately 5,500 linear feet to a junction at the left bank of Oregon Slough with the Union Avenue embankment, a similar State Highway. Denver Avenue is a four-lane highway of approximately 40 feet or more top width, built to a height of approximately 36 to 38 feet above M.S.L., with side slopes of approximately 1 on 1½. This highway fill was built in approximately 1913. An underpass was constructed through Denver Avenue near the Columbia Slough end by the Oregon State

Exhibit No. 66—(Continued)

Highway Department. This underpass was protected on the easterly side of the Avenue by a semicircular earthen levee of the same height as Denver Avenue with 1 on 1½ side slopes and a 12-foot top width. This protective levee had a longitudinal crack extending along the top of its northerly portion, which was reported to have formed not long after original construction was completed.

A 60-inch diameter culvert, which originally carried seepage water from the Peninsula Drainage District No. 2 through Denver Avenue to a drainage ditch in Peninsula Drainage District No. 1 and on to a pumping plant which once pumped for both districts, was reported to have been plugged by W.P.A. construction prior to 1940. Surface investigation of the side slopes and toes of Denver Avenue embankment revealed no ends of the pipe which were apparently covered and could not be located for examination of the reported plug.

2. Tide Boxes—This drainage district contained no tide boxes.

3. Pumping Plant—A pumping plant located at the southwesterly corner of the district adjacent to Columbia Slough levee contained two pumps having the following rated capacity:

1 pump—19,400 G.P.M. at a 6-foot head
1 pump—2,400 G.P.M. at a 25-foot head

Exhibit No. 66—(Continued)

C. Area Protected

The area lying within the aforementioned boundaries consists of 1,425 acres and contained a great number of fine urban homes and businesses, a few of which are listed as follows: Portland Meadows race track and buildings, an amphitheater, auto race track, two or more auto courts, Columbia-Edgewater Golf Course, Matheny & Bacon (salvage concern), a Marine Boat Shop, Faloma Elementary School, F. J. Kernan Stock Farm (including private training track and fine farm buildings), and many other smaller businesses along Union, Denver and Vancouver Avenues which bisected the district and along Marine Drive which fronted the district by the Columbia River. Development of the district into a thickly populated urban area had been very rapid within the past ten years and much of the land formerly used for agricultural purposes had been developed into sub-divisions and business properties. From Faloma Station to the Portland Yacht Club many small homes were built close to Marine Drive and from Portland Yacht Club to the Columbia-Edgewater Golf Clubhouse there were a continuous number of expensive homes built upon the highest part of the wide levee section which had been formerly built by hydraulic dredging.

* * *

V. Status of Area Following the Flood

Property damage to buildings was very great as many one-story buildings were floated from their

Exhibit No. 66—(Continued)

foundations and carried away. Other buildings which were not moved were partially immersed resulting in the warping of siding and flooring, ruining of plaster walls and the water staining of all parts immersed. Shrubbery around homes and crops were practically 100% ruined. A very few houses along Marine Drive built on high foundations or on high ground escaped flood damage. Columbia-Edgewater Club House suffered considerable damage to its basement from immersion and the golf course was totally immersed killing the grass cover. The breaks in Denver and Union Avenues caused a stoppage of all traffic to the Interstate Highway Bridge until repairs were made at a later date by means of part fills and part trestles.

VI. Recommendations and Comments

A. Columbia River Flood Fight Plan

The need of a good Flood Fight Plan for the Columbia River was made very apparent to all concerned in the recent flood fight activities. The suddenness that such a plan must be put into effect precludes any last minute planning and to be effective such a plan must be worked out in the fullest detail possible and be kept up to date by constant revisions in order that it may be most effectively used when necessary.

Listed below are certain features which are recommended for incorporation in this Plan:

Exhibit No. 66—(Continued)

1. Predetermined assignment of key personnel to flood areas who have the proper experience and background to act as area supervisors and assistants.

2. Periodic visits by such personnel to the assigned areas in order to familiarize themselves with conditions in the area and meet and know the key people of the district and community with whom they would be dealing during a possible flood fight.

3. Predetermination and assignment of sources of materials, equipment and labor for the various areas, especially for the following: Materials: sandbags, sand, gravel, rip-rap rock, cement, lumber, piling, gasoline, oil and lubricants, steel landing mats, telephone wire, mesh wire. Equipment: trucks (flatbed, dump, pickup, four-wheel-drive, etc.), cars, cranes, Diesel shovels, tractors, scoopmobiles, floating plant (such as power boats, row boats, tugs, dredges, dukws, etc.), light plants, small tools (shovels, axes, brush hooks, wrenches, etc.), pumps of various sizes and kinds, intake and discharge lines (pipe), flashlights, batteries, rubber boots, walkie-talkie radios, field phones. Labor: Predetermination of flood fight labor and foremen from adjacent business concerns such as: lumber mills, aluminum plants, stevedore unions, etc., who are generally available at such times due to closure of business activities due to high water.

4. Predetermination and assignment of field

Exhibit No. 66—(Continued)

headquarters in each area with available telephone communications.

5. Predetermined plan for station marking of the levees by signs indicating mileage from a given point for every tenth of a mile around each levee system in order to expedite correct deliveries of men, equipment and materials during a flood fight, and to also provide a quick and more accurate means of describing the location of trouble spots requiring investigation.

6. Provision and use of radio equipped cars for area supervisors and key personnel in order to expedite important messages, information and directions for the supervision of the work on which time is one of the most important elements. These same cars could be used to receive directions from the District office and to submit reports of emergency nature thereto from any location within the area.

7. Predetermined division of large flood districts into sectors with sector supervisors, their assistants and area supervisors definitely assigned and duties of each delineated.

8. Arrangements for periodic training courses for newly assigned men that are unfamiliar with the type of protective work required, methods used, and policies to be followed when cooperating with other agencies and organizations.

Exhibit No. 66—(Continued)

B. Repair and Improvement of Protective Works on Peninsula Drainage District No. 2

1. Study and investigation of front levee from Union Avenue to the Portland Yacht Club for reconstruction of levee by widening to provide a section of greater width and stability in which the natural seepage line is well within the levee section. Investigation of same levee in regard to location and removing any sewer and water lines installed therein by property owners.

2. Construction of a two-way, all-weather roadway on the top of the entire levee system to provide access at all times for emergency repairs, inspection, etc.

3. Enforcement of regulations requiring the drainage district organization to properly maintain the levee system including removal of all brush, trees, high grass and weeds from the levee top and side slopes thereby removing such hazards to the visual inspection of seepage spots during flood periods.

4. Investigation and study as to the necessity of a cut-off trench and impervious blanket on Denver and Union Avenues to prevent a possible recurrence of failures during floods of similar height.

5. Elimination of underpass through Denver Avenue.

6. Provisions for stop-log structures in the un-

Exhibit No. 66—(Continued)

derpasses through Union Avenue. Sandbag plug was washed out during the subject flood.

/s/ KENNETH R. DIBBLEE,
Assistant Chief, Construction Branch, Operations Division.

Maps of area filed in enclosure file.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 68

Peninsula Industrial Co., to Multnomah County:

Know All Men by These Presents that Peninsula Industrial Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, in consideration of one dollar ($1.00) and other good and valuable considerations to it paid by Multnomah County, State of Oregon, a public corporation of the State of Oregon, has bargained and sold and by these presents does grant, bargain, sell and convey unto said Multnomah County, State of Oregon, a public corporation, its successors and assigns, all the following bounded and described real property situated in the County of Multnomah and State of Oregon.

Parcel A. A strip of land eighty (80) feet wide being forty (40) feet on each side of a center line described as follows:

Exhibit No. 68—(Continued)

Beginning at a point in the North line of the land owned by the Riverton Land Company in section ten (10), township one (1) north, range one (1) east, Willamette Meridian, which is described in book 454 at page 354, records of deeds for Multnomah County, Oregon, which point is seven hundred sixty-five (765) feet more or less measured along the said north line from the intersection of the said north line and the east and west line between section ten (10) and section three (3), township one (1) north, range one (1) east, Willamette Meridian; thence north twenty-two degrees (22°) twenty-two minutes (22′) west eighteen hundred ten (1,810) feet, more or less; thence on a curve of three degrees (3°) to the left seven hundred seventeen (717) feet; thence north forty-three degrees (43°) fifty-two minutes (52′) west thirty-eight hundred eighty-nine feet (3,889) more or less; thence on a curve of thirteen degrees (13°) to the right five hundred thirteen (513) feet; thence north twenty-two degrees (22°) forty-eight minutes (48′) east one hundred seventy (170) feet, more or less, to the low-water line of the Oregon Slough; said tract of land containing thirteen and one-tenth (13.1) acres more or less.

Parcel B. A strip of land eighty (80) feet wide being twenty-one (21) feet wide westerly from and fifty-nine (59) feet wide easterly from a line described as follows:

Beginning at a point the intersection of the cen-

Exhibit No. 68—(Continued)

ter line of Derby Street extended northward with the north line of the John Rankin Donation Land Claim in section nine (9), township one (1) north, range one (1) east, Willamette Meridian; thence northward on a curve of two degrees (2°) to the right of the extension of said center line of Derby Street six hundred (600) feet; thence north twelve degrees (12°) east fifty-four hundred fifty (5,450) feet more or less to a point which is the intersection of the north line of section four (4), township one (1) north, range one (1) east, Willamette Meridian, and the center line of the above-described Parcel A. Said tract of land containing ten and eight-tenths (10.8) acres more or less.

Together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining and also all its estate, right, title and interest in and to the same.

Together with the right to construct and maintain such ditches as may be necessary to provide suitable drainage required by the placing of fills or other structures by the said Multnomah County upon the parcels of land hereby conveyed, the location, width and manner of construction of the said ditches to be subject to the approval of the grantor; also the right to place the toe of the slopes of any embankments upon the real property belonging to the grantor adjoining that described in Parcels A and B herein, and the right to waste earth upon said adjoining land wherever necessary by reason

Exhibit No. 68—(Continued)

of any fill or other structure placed by the said Multnomah County upon either of the parcels of land granted hereby; but nothing herein shall be construed to convey any interest in the land of the grantor other than in Parcels A and B as herein described.

Reserving However unto the grantor and its successors all the following property privileges, rights and easements.

(a) The right to dedicate as provided by law public highway crossings and to pay out and use private highway crossings over, under or across either or both of said parcels of land hereby conveyed;

Provided However That the cost and expense thereof shall be paid by the grantor herein or its successors, except as otherwise provided in this deed.

(b) The right to cross with railroad tracks for industrial and switch track purposes under, over or at grade either or both of the parcels of land hereby conveyed at such points and places as may be desired by the grantor or its successors;

Provided However that the grantor or its successors shall be and they are hereby limited to construct and maintain not more than four (4) such crossings at grade over each of the parcels of land hereby conveyed, and the cost and expense of installing or operating any safety devices or ap-

Exhibit No. 68—(Continued)

pliances required for any of said railroad crossings by any law of the State of Oregon or by order of any regulating body of said state shall be borne as provided by law or by the order of such regulating body.

(c) The right to construct and to maintain at the expense of the grantor or its successors one (1) crossing not to exceed one hundred (100) feet in width under and through each of said parcels of land hereby conveyed, to be used by the grantor for a deep water channel, the location of said crossings on each of said parcels of land to be designated by the grantor;

Provided However That the construction thereof shall be of a character similar to the steel bridge hereafter to be built by the grantee herein on the Union Avenue approach to the Interstate Bridge over the Columbia Slough; and Provided Further That the grantor herein or its successors shall construct said crossings in such manner as not unreasonably to interfere with the traffic over said parcels of land as a highway.

(d) The right to cross and recross said parcels of land hereby conveyed with underground pipes and conduits and with overhead or underground telephone, telegraph, electric light, power or other wire crossings, the location of each of said crossings to be determined by the grantor but the type of construction to be first-class in every detail and

Exhibit No. 68—(Continued)

plans to be filed with the said county prior to said construction and any property of the county that may be disturbed in the construction of said crossings shall be restored to the reasonable satisfaction of said county.

(e) The right to construct and maintain on any portion of the said two parcels hereby conveyed not occupied or at any time required or to be required by the roadway or roadways at any time to be constructed thereon by Multnomah County, such fills, embankments and roadways as the grantor or its successors shall determine and with the right in the said grantor, its successors or assigns to occupy and use the same which said fills, embankments and roadways may be supported in whole or in part by any fill, embankment or structure constructed or maintained or either of said parcels by Multnomah County;

Provided However, That such fills or embankments so to be constructed or maintained by the grantor or its successors shall be constructed, maintained and used in such manner as not to interfere with the convenient use or occupation of any roadway maintained or to be maintained by Multnomah County or the public on either of said parcels of land hereby conveyed and so much of said fills or embankments as shall lie within Parcels A or B, shall be vacated by said grantor, its successors or assigns wholly or partly as may be required by said grantee, its successors or assigns, for highway pur-

Exhibit No. 68—(Continued)

poses without compensation for said improvements; and

Provided Further That the grantor or its successors so constructed or maintaining such embankment, fill or roadway shall make due provision for all drainage required by reason of the construction or maintenance by the grantor or its successors of such fill, embankment or roadway.

To Have and to Hold the above-described and granted premises subject to the reservations herein enumerated unto the said Multnomah County, State of Oregon, a public corporation, its successors and assigns forever;

Provided However and this conveyance is made upon the following express conditions which are hereby declared and agreed to be conditions subsequent.

(a) That the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained upon that part of the tract of land herein described as Parcel B, which is north of the north bank of Columbia Slough, a fill and embankment which shall as far as possible duplicate the fill and embankment to be constructed by said Multnomah County upon Parcel A as described herein, the west side line of the crown of said fill or embankment to coincide substantially with the west side line of said Parcel B, and shall, within said period, provide and thereafter maintain

Exhibit No. 68—(Continued)

a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover and if sufficient funds shall be available out of the proceeds of the so-called interstate bridge bonds of Multnomah County to pave said highway in substantially the same manner as the highway to be constructed over the said Parcel A herein described, shall be paved then and within said period above prescribed said Multnomah County shall likewise pave the said highway to be constructed over the said Parcel B as herein described, which pavement shall thereafter be maintained in the manner provided by law.

(b) That the said Multnomah County shall construct of earth or other material approaches at a three per cent (3%) grade at two (2) different points leading over and across any highway, fill or structure placed upon each of the parcels hereby conveyed the location of said crossings to be designated by the grantor herein.

(c) That no toll shall ever be collected by the said Multnomah County for any travel over any highway constructed over Parcel B as herein described; Provided that this clause shall not be construed as a limitation on the right of the grantee or its successors to impose a license tax on public carriers or to impose a franchise or other tax on public carriers.

And the said Peninsula Industrial Company, a corporation, grantor above named, does covenant to

Exhibit No. 68—(Continued)

and with the county of Multnomah, State of Oregon, a public corporation, the above-named grantee, that it is lawfully seized in fee simple of the above-granted premises, that they are free from all incumbrances and that it will and its successors shall warrant and forever defend the above-granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, subject to the reservations herein contained and the conditions subsequent herein enumerated to be kept and performed by the said grantee.

In Witness Whereof Peninsula Industrial Company, a corporation, pursuant to a resolution of its board of directors, duly adopted, has caused the within instrument to be executed by its officers thereunto duly authorized and its corporate seal to be affixed this 16th day of March, 1915.

PENINSULA INDUSTRIAL
COMPANY,

By C. C. COLT,
President.

Attest:

W. W. DOWNES,
Secretary.

Signed, sealed, and delivered in the presence of us as witnesses.

OMAR C. SPENCER,
H. E. KIZER.

(Corporate Seal)

Exhibit No. 68—(Continued)

State of Oregon,
County of Multnomah—ss.

On this 16th day of March, 1915, before me appeared C. C. Colt, to me personally known, who, being duly sworn, did say that he is the president of the Peninsula Industrial Company, the corporation that executed the within and foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors and said C. C. Colt acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate, written.

[Seal] OMAR C. SPENCER,
Notary Public for Oregon.

10 one dollar Doc U. S. Int. Rev. stamps (canceled).

Rec. for record Mar. 31, 1915, at 4:52 p.m.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 69

Peninsula Industrial Co., With Multnomah County

Know All Men by These Presents that Whereas Peninsula Industrial Company, a corporation, hereinafter called the "Company" by deed dated March 16, 1915, and recorded in book 687 at page 39, records of deeds for Multnomah County, Oregon, intended to convey certain parcels of land to Multnomah County, a public corporation of the state of Oregon, hereinafter called the "County," together with certain easements, rights and privileges therein described all for highway purposes, but reserved unto the grantor therein named certain property privileges, rights, and easements, such conveyance being also subject to certain express conditions therein set out; and

Whereas it was the intention of the parties that the county was to construct certain fills and highways upon said parcels, but from actual surveys on the ground the parties have agreed that said fills and highways as constructed are located partly on and partly off said parcels so conveyed; and

Whereas the parties have agreed that a correction deed shall be executed in order that said fills and highways may be located upon land covered by said conveyance and in order that said county will have no interest in land not used or intended to be used for said highways, and in order to carry out the true intent of the parties.

Exhibit No. 69—(Continued)

Now Therefore, Peninsula Industrial Company, a corporation, in consideration of one dollar ($1.00) and other good and valuable considerations to it paid by Multnomah County, a public corporation of the state of Oregon, does hereby grant, bargain, sell and convey unto said Multnomah County, its successors and assigns, the following bounded and described parcels of real property situated in the county of Multnomah and state of Oregon, to wit;

Parcel A. A strip of land eighty (80) feet in width being forty (40) feet on each side of a center line described as follows;

Beginning at the intersection of the center lines of Union Avenue and Columbia Boulevard, thence running north 0° 14′ east 29.2 feet along the center line of Union Avenue, thence through an 8° 00′ curve to the left 278.8 feet, thence running north 22° 04′ west tangent to said curve 3,552.1 feet which is the point of beginning of the center line to be described:

Beginning at the point last mentioned which is also described as being the north line of the Lewis Love seventy-one acre tract as described in book I at page 45, deed records of Multnomah County, at a distance of 906.67 feet westerly from the northeast corner of said tract, thence running north 22° 04′ west 1.414.24 feet; thence through a 3° 00′ curve to the left 725.5 feet; thence running north 43° 50′ west tangent to said curve 4,273.2 feet; thence through a 13° 00′ curve to the right 413.0 feet to the north line of section 4, township 1 north, range

Exhibit No. 69—(Continued)

1 E., W.M., Oregon, which point is also 72.2 feet west of the northeast corner of said section, thence continuing along said 13° 00′ curve 99.8 feet, thence running north 22° 50′ east 170.0 feet, to the low-water line of North Portland Harbor, containing 12.98 acres;

Parcel B. A strip of land eighty (80) feet wide being twenty-one (21) feet westerly and fifty-nine (59) feet easterly from a center line described as follows:

Beginning at a point on the north line of section 4, township 1 north, range 1 east, of Willamette Meridian, Oregon, which point is also 72.2 feet west of the northeast corner of said section, thence running south 11° 42′ west 5,393.5 feet, containing 7.31 acres;

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

The parties to this instrument hereby agree that the parcels of land above-described were intended to be conveyed in the deed first herein above mentioned and the description of said parcels are hereby accepted by the parties as correct descriptions and are in lieu of the descriptions used in the deed first above mentioned, and in consideration of this conveyance Multnomah County, a public corporation of the state of Oregon, does hereby grant, bargain, sell and convey unto Peninsula Industrial Company, a corporation, its successors and assigns, all its right,

Exhibit No. 69—(Continued)

title or interest in or to any of the real property described as Parcels A and B in the said deed dated March 16, 1915, and above referred to, except so much of said parcels as is included in the corrected description of said Parcels A and B set out in the present conveyance.

It is understood between the parties hereto that except for the correction of the descriptions of Parcels A and B, all other terms, provisions, covenants, conditions, or agreements contained in the said deed between the parties hereto dated March 16, 1915, shall continue and be in full force and effect and shall have equal application to the new description of Parcels A and B herein contained and shall have the same force and effect as though set out in full in this instrument.

In Witness Whereof Peninsula Industrial Company, pursuant to a resolution of its board of directors, has caused this instrument to be executed by its officers and its corporate seal affixed, and Multnomah County, pursuant to a resolution of its board of county commissioners, has caused this instrument to be executed and its seal affixed this 31st day of December, 1926.

[Seal] PENINSULA INDUSTRIAL COMPANY.

By B. C. DARNALL,
President.

By F. R. DEUELL,
Secretary.

Exhibit No. 69—(Continued)

Witnesses:

E. A. TERRILL,

L. W. McDONNELL.

[Seal] MULTNOMAH COUNTY.

By AMEDEE M. SMITH,

CLAY S. MORSE,

GRANT PHEGLEY,

Commissioners.

Witnesses:

ORPHA R. POOR,

ANN MENSEN.

Approved as to form:

GEO. MOWREY,

Deputy District Attorney.

State of Oregon,
County of Multnomah—ss.

On this 31st day of December, 1926, before me appeared B. C. Darnall and F. R. Deuell, to me personally known who being duly sworn, did each for himself say that he, the said B. C. Darnall is the president, and he, the said F. R. Deuell, is the secretary of Peninsula Industrial Company, the corporation that executed the within instrument and that the seal affixed to said instrument is the cor-

Exhibit No. 69—(Continued)

porate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said B. C. Darnall and F. R. Deuell acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

[Seal] F. L. WEBSTER,
Notary Public for Oregon.

State of Oregon,
County of Multnomah—ss.

On this 12th day of December, 1926, before me appeared Amedee M. Smith, Clay S. Morse and Grant Phegley, to me personally known, who being duly sworn did each for himself say that he is one of the Commissioners of Multnomah County, the corporation that executed the within instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of commissioners, and said Amedee M. Smith, Clay S. Morse, and Grant Phegley acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my

Exhibit No. 69—(Continued)

hand and affixed my official seal this the day and year first in this, my certificate written.

[Seal] ORPHA R. POOR,
Notary Public for Oregon.

My commission expires Sept. 3, 1930.

Rec. for record Jan. 13, 1927, at 3:08 p.m.

[Endorsed]: Filed August 5, 1953.

EXHIBIT No. 78

In the District Court of the United States in and for the District of Oregon

UNITED STATES OF AMERICA,

Petitioner for Condemnaton,

vs.

CERTAIN PARCELS OF LAND in Multnomah County, Oregon, and the Peninsula Public Golf Course, Inc., et al.

DECLARATION OF TAKING

* * *

[Declaration of Taking concerning the taking of 136.11 acres bounded by Denver Avenue on the east —Subdivision No. 3 which reads as follows:]

3. The estate taken for said public use is the full fee simple title in and to said lands, together with

all improvements thereon and any leaseholds and other interests therein; subject, however to (1) Slope easements, if any, in favor of Multnomah County in connection with the Denver Avenue Approach to the Interstate Bridge; (2) the easements existing in favor of the Peninsula Drainage District No. 2; and (3) an easement or right of way in favor of the Portland General Electric Company, for the purpose of constructing and maintaining power lines and poles in and across the site.

* * *

[Endorsed]: Filed January 7, 1944.

United States District Court for the
District of Oregon

Civil 5190

MEARL C. TILLMAN and EMILY P. TILLMAN, Husband and Wife,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

1949

Dec. 15—Filed complaint.

Dec. 15—Issued summons—to marshal.

1950

Jan. 3—Filed summons with marshal's return.

Jan. 18—Filed def's motion to dismiss.

1951

Nov. 23—Filed answer of deft. U. S.

1952

Oct. 31—Filed depositions of K. C. Todd, D. C. Byers & F. J. Kernan on behalf of deft.

1953

Apr. 27—Pre-trial conference.

June 8—Pre-trial conference, order setting tentatively for July 30.

Aug. 4—Filed & entered pre-trial order.

Aug. 4—Record of trial.

Aug. 5—Record of trial, order entered allowing plffs. to Sept. 15, deft. to Oct. 15 & plffs. to Oct. 25 for briefs.

Aug. 5—Filed exhibits 1 to 56, 58 to 65h, 65j to uu, 66 to 69, 72 to 74, 76 to 78 incl.

Aug. 11—Filed stipulation for withdrawal of exhibits.

Aug. 11—Filed & entered order permitting withdrawal of exhibits 1 thru 78.

Sept. 15—Filed plaintiffs' brief.

Oct. 12—Filed brief in this and related cases.

Oct. 26—Filed reply brief in this and related cases.

1954

Feb. 11—Filed transcript of proceedings of Aug. 4 & 5, 1953.

Feb. 23—Record of opinion.

Apr. 5—Record of submission of proposed findings, conclusions & judgment, entered order setting for hearing April 12, 1954.

Apr. 15—Filed plaintiffs' objections to proposed findings of fact & conclusions of law.

Sept. 7—Entered order setting for hearing on findings, etc., for Sept. 9, 1954.

Sept. 8—Filed objections to defendant's proposed additional findings.

Sept. 9—Record of hearing on proposed findings & objections thereto.

Sept. 14—Filed and entered findings of fact and conclusions of law.

Sept. 14—Filed and entered judgment.

Nov. 9—Filed notice of appeal by plaintiff in this and related cases.

Nov. 9—Filed bond for costs on appeal in this and related cases.

Nov. 9—Filed stipulation re forwarding original file and exhibits to C of A.

Nov. 9—Filed & entered order to forward exhibits to Court of Appeals.

Nov. 10—Filed designation of record on appeal.

In the United States District Court for the District of Oregon

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby

certify that the foregoing documents consisting of Complaint; Answer of the United States; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Bond for costs on appeal; Stipulation re forwarding exhibits, etc., to Court of Appeals; Order to forward exhibits, etc., to Court of Appeals; Designation of record; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5190, Mearl C. Tillman and Emily P. Tillman, husband and wife, vs. United States of America (and Related Cases) are appellants and plaintiffs and United States of America is the appellee and defendant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is $5.00, and that the same has been paid by the appellants.

I further certify that there is also enclosed the Transcript of Proceedings of August 4 and 5, 1953; Opinion of Chief Judge James Alger Fee (not filed) and proposed findings of fact and conclusions of law (not filed), and

I further certify that there is being forwarded under cover exhibits 1 to 56; 58 to 64; 65-a to 65-h; 65-j to 65-z; 65-aa to 65-mm; 65-oo to 65-uu; 66; 67-a to 67-k; 68; 69; 72 to 74; and 76 to 78.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District this 3rd day of December, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14590. United States Court of Appeals for the Ninth Circuit. Mearl C. Tillman and Emily P. Tillman, husband and wife, Appellants, vs. United States of America, Appellee. (And Related Cases.) Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14590
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS ON WHICH APPELLANTS INTEND TO RELY

In accordance with subdivision 6 of Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, the appellants submit this statement of the points on which they intend to rely on their appeal:

I.

The Court erred in paragraph I of the Findings of Fact in adopting the "Findings of Fact in the opinion of the Court." The Findings of Fact seem to incorporate the Findings of Fact specified in the Court's opinion. Therefore, pointing out the errors in the opinion would seem to be merely a duplication of pointing out the errors in the Findings. Substantially all of the Findings in the opinion, as well as the Findings of Fact, appear to be all either without the issues between the parties or contradictory to the Pre-trial Order and the evidence.

Therefore, pointing out the errors in the Findings of Fact as well as in the Conclusions of Law (the Conclusions of Law in the opinion are also adopted as part of the Conclusions of Law) will probably be a sufficient designation of points to be raised by the appellants to indicate to the appellee that it is contended by the appellants that all Findings of Fact and Conclusions of Law which are not favorable to the appellant are either without the issues of the case nor supported by the evidence or are directly contradictory thereto.

II.

The Court erred in its Finding No. III of the Findings of Fact in that portion thereof which reads as follows:

"District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1) as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None of these fills, dikes and levees was owned or controlled by the United States."

III.

The Court erred in Finding No. IV of said Findings of Fact as to the following portions thereof:

"For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. * * * No protest

against construction of the underpass was made by District No. 2. A resolution mildly suggesting objections to the construction of the underpass without a stop-log structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group."

IV.

The Court erred in Finding No. 5 of said Findings of Fact as to that portion thereof which reads:

"Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in District No. 2. * * * As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948, the western embankment of District No. 1 failed."

V.

The Court erred in its Finding No. 7 of said Findings of Fact as to the following portions thereof:

"The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. * * *"

VI.

The Court erred in Finding No. 8 of said Findings of Fact as follows:

"Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure. The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. * * * Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes."

VII.

The Court erred in Finding No. 9 of said Findings of Fact as follows:

"In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen."

VIII.

The Court erred in Finding No. 10 of said Find-

ings of Fact in making the following Finding recited therein:

"District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of aproximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the District. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs."

IX.

The Court erred in making Finding No. 12 in its entirety.

X.

The Court erred in its Finding No. 13 in its entirety.

XI.

The Court erred in its Finding No. 14 in its entirety.

XII.

The Court erred in its Finding No. 15 in its entirety.

XIII.

The Court erred in its Finding No. 16 in its entirety.

Conclusions of Law

XIV.

The Court erred in its Conclusion No. 1 in adopting the Conclusions of Law set forth in the opinion of the Court.

XV.

The Court erred in its Conclusion of Law No. 5 in its entirety.

XVI.

The Court erred in its Conclusion of Law No. 6 in its entirety.

XVII.

The Court erred in its Conclusion of Law No. 7 in its entirety.

XVIII.

The Court erred in its Conclusion of Law No. 8 in its entirety.

XIX.

The Court erred in its Conclusion of Law No. 9 in its entirety.

XX.

The Court erred in its concluding paragraph of said Conclusions of Law, as follows:

"These Findings of fact and conclusions of law are in accordance with the pre-trial order, the record made on the trial of the actions and the opin-

ion of the Court heretofore filed in these consolidated cases."

XXI.

The Court erred in failing to find that District No. 2 depended upon Denver Avenue Fill, formerly known as Derby Street, as flood protection from the west; that it had been constructed by the County of Multnomah and improved by the State Highway Commission under a contract, for valuable consideration, whereby the property owners in District No. 2 were given an easement to use such fill for flood protection purposes. That said fill and its utility as flood protection was deliberately, wrongfully, negligently and without legal authority destroyed by the construction of an underpass through such fill by the Federal Public Housing Authority acting as agent for the United States of America.

XXII.

That the Court erred in failing to find that the said United States of America and Federal Public Housing Authority wrongfully, negligently and deliberately failed to protect District No. 2 and the properties of the plaintiffs by an adequate ring levee surrounding such underpass for protection from waters approaching from the west, and by such acts completely destroyed the protection of the property owners in District No. 2 which they had and were entitled to retain from the said Denver Avenue Fill.

XXIII.

That the Court erred in failing to find that the said Denver Avenue Fill was complete and adequate

protection against the inundation of the lands in District No. 2 prior to the construction of such underpass and the failure to adequately protect the same.

XXIV.

The Court erred in finding for the defendant and failing to find for the plaintiffs.

/s/ VIRGIL CRUM,
Of Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 15, 1954.

In the United States Court of Appeals,
for the Ninth Circuit
No. 14,590
(And Related Cases)

MEARL C. TILLMAN and EMILY P. TILLMAN,
Husband and Wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee,

STIPULATION

It Is Hereby Stipulated by and between counsel for the appellants and the appellee in the above-entitled cause and the following related and consolidated cases, to wit, Nos. 4857, 4865, 4806, 4858, 4860, 4859, 4686, 4861, 4687, 4688, 4862, 4796, 4797, 5331,

4863, 5556, 4689, 4690, 4864, 4987, 5557, 5645, 4568, 4798, 4799, 4807, 5315, 4691, 4800, 4808, 4693, 4692, 4694, 4685, 4866, 4867, 5459, 4695, 4868, 4869, 4870, 4696, 4801, 4871, 4802, 5603, 4809, 4872, 4803, 5549, and 5633, as follows:

Whereas, the above cause and all of the related cases were consolidated by stipulation in the Pre-trial Order and tried as to the liability of the United States of America for damages resulting to the appellants for flood damage, the amount of the damage to be determined later in the event the judgment be for the appellants; and

Whereas, the complaint in the above-entitled key case is typical of all complaints and it was further stipulated in the Pre-trial Order that the issues were set forth in the Pre-trial Order and as a result all question of the issues, fact and law are identical in each and all of the cases; and

Whereas, a multitude of exhibits were introduced at the trial which are not considered as having any bearing upon the issues to be raised in the United States Court of Appeals, and likewise a considerable portion of the Pre-trial Order is not considered by the appellants as having any bearing upon the issues:

Now Therefore, It Is Hereby Stipulated and Agreed by and between appellants and appellee and their counsel, and by and with the consent of the United States Court of Appeals for the Ninth Circuit, as follows:

First: That the original files in said key case, Tillman vs. United States of America, No. 5190, including the pleadings and all proceedings had thereunder, and all of the original exhibits introduced into evidence, be forwarded to the United States Court of Appeals for the Ninth Circuit, as the record on appeal in these cases.

Second: That such original exhibits need not be printed and only so much of the Pre-trial Order and other proceedings as counsel for the appellants and appellee may desire. Said exhibits and the record may be considered by the Court in the original form with the privilege of counsel to print such portions of the same as an appendix to their briefs or by designation to the Clerk of the United States Court of Appeals as they may desire, and with the privilege of counsel to raise any question as to any finding of the District Court not being supported by the evidence.

Dated, this 12th day of November, 1954.

/s/ VIRGIL CRUM,
Of Attorneys for Appellants.

/s/ C. E. LUCKEY,
Of Attorneys for Appellee.

[Endorsed]: Filed December 9, 1954.